REPORT

for implementation of an
Appropriate Dispute Resolution System
for Alberta's Upstream Petroleum Applications

Prepared for:

EUB Alberta Energy and Utilities Board

Prepared by:

CDRC
Canadian Dispute Resolution Corporation
The ADR Team – May 1, 2000
Est. 1987

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Executive Summary

Acknowledgements:
The consulting team would like to acknowledge the significant and substantial contribution of time and energy by a number of stakeholder representatives and the Alberta Energy and Utilities Board staff and Board members. Through their drive and commitment in exploring positive means for enhancing the resolution of EUB related issues among industry with land owners, they initiated this project and got it off the ground.

A multi-stakeholder steering committee has devoted a great deal of time to providing valuable feedback, asking challenging questions and sharing useful insights. Thanks for their commitment. The members of this steering committee are listed in Appendix 1.

Introduction:
The CDRC EUB Dispute Resolution Consulting team was assembled in early December 1999. The purpose was to assist the Alberta Energy and Utilities Board (EUB) and multi-stakeholder steering committee with the design of a system to improve EUB facilitation and to introduce mediation and other collaborative options into the EUB application process. The overall objective was to improve the tools available to EUB staff to facilitate the early resolution of application disputes using a flexible ADR process resulting in:

- enhanced efficiencies, and meeting of stakeholders needs
- better use of time and other resources
- improved land owner-industry and industry-industry relationships

The obligation of industry to address issues and concerns problems through its public consultation process remains the mainstay of the EUB system.

Currently, approximately 5% of proposed developments within the EUB mandate involve unresolved issues or conflict and these appear to be increasing in numbers and intensity in recent years.

Conflict, according to the Merriam-Webster definition, is a "competitive or opposing action of incompatibles". Whether it is in the workplace, with our families or while interacting with others, conflict is a part of our lives that we must deal with on a daily basis.

Presently, issues and disputes between land owners and energy companies that involve the EUB are resolved in a number of ways. Some means are informal and flexible, other means are more formal. The options can be viewed as existing along a continuum. At one end of the continuum are processes allowing parties control over influencing and shaping the final arrangement, such as informal negotiation. At the other end is the process of a formal EUB hearing, which results in a final decision being made for the parties.

The piece identified to be strengthened from the EUB's available dispute resolution spectrum is, to quote from a participant at the Conflict Solutions 2000 Conference, "something between

the kitchen table and the hearing process". The major recommendations in this report deal with completing the EUB continuum of dispute resolution and focus on strengthening the role of staff in facilitating early resolution and establishing a neutral mediation process. These ADR processes are additional tools for resolution and are not intended to replace the first step of public consultation.

Summary:
This report focuses on enhancing the EUB's current culture of facilitative support to industry and stakeholders. The tools of increased facilitation and the option of mediation are added to support an interest-based negotiation environment. Stakeholders are encouraged to continue to take responsibility for creating an equitable and effective EUB Dispute Resolution System.

The accompanying flow chart provides a visual concept of the proposed full EUB continuum of dispute resolution. The text in this Summary and in more detail in the full report explains the proposed changes.

The EUB becomes involved in the resolution of issues within industry and between industry, land owners and the public:

- As an application for development is being prepared
- When an application is considered to be non-routine
- In operational issues

Traditionally, EUB staff have provided facilitation toward resolving these issues or the matters were directed to a Board hearing for decision.

Facilitation:
The EUB has committed increased resources to support the facilitation role of staff so more potential disputes are resolved early.

A facilitator is a coordinator of an informal problem solving process. The role of a facilitator is to encourage participation in this process by relevant parties, manage their input and assist in the creation of an effective resolution. EUB facilitators are also, in effect, a party to the resolution process because they represent the regulatory body that sets standards and policies affecting the parties.

Facilitation guidelines for staff are included in this report.

Mediation:
There will be situations that are too complex, time consuming, controversial or confrontational to be resolved by staff through facilitation. It is recommended that the EUB establish voluntary mediation as an available alternative and that the Board strongly encourages its use.

Mediation is defined as:

"A collaborative conflict resolution approach in which two or more parties in dispute are assisted in their negotiation by a neutral and impartial third party and empowered to voluntarily reach their own mutually acceptable settlement of the issues in dispute. The mediators structure and facilitate the process by which the parties make their own decisions and determine their outcome, in a way that satisfies the interest of the parties in the dispute.[1]

Parties may choose mediation on their own, staff may request parties to consider mediation, and in some circumstances, the Board may strongly suggest its use. Criteria for assessing situations for mediation are included in this report.

The administrative aspect of planning and coordinating mediation would be managed between an internal EUB staff and an external service provider. A service provider is an outside organization or company with recognized expertise in case management and is available to assist parties in their preparation for mediation.

The mediation process need not be limited to resolution of matters within EUB jurisdiction alone. It is conceivable that parties may also need to resolve compensation or other issues as well. These are easily accommodated within an inclusive mediation process. It is recommended that the EUB engage other regulatory agencies in further discussions to address overlapping jurisdictions.

Many questions need to be addressed and answered for parties prior to them being able to commit to participating fully in mediation. It is recommended that initially the parties attend a mediated Preliminary ADR Meeting. It is anticipated that, in most cases, the Preliminary ADR Meeting will be of limited duration and nominal cost. At this meeting, they will explore and reach agreement on issues such as timing and deadlines, confidentiality and privacy, costs, role of advisors and further process steps.

In some cases, parties will need to address the need for scientific and technical information. At this meeting, they can jointly determine the information required and a collaborative and cost effective means of obtaining it.

The outcome of this Preliminary ADR Meeting is that parties may:

- Settle their issues quickly in that meeting
- Participate in subsequent mediation
- Proceed to other dispute resolution processes such as a Board hearing.

A framework for this meeting is included in the Report.

Skilled mediators are integral to an effective ADR program. Parties will be able to select a mediator from a prepared roster of qualified mediators. While every mediator brings his or her

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[1] Cheryl Picard, *Mediating Interpersonal and Small Group Conflict*, Golden Dog Press, Ottawa, 1998

own unique style to a mediation, generally, the process involves the parties communicating with each other to:

1. Identify and clarify their issues;
2. Identify their specific needs and concerns related to the issues;
3. Generate options for resolving their issues; and
4. Create agreement.

The outcomes from a mediation are that:

1. All issues are resolved;
2. Some or all of the issues remain unresolved. In this case, the parties and the EUB will determine the most effective way to reach a settlement, after a hearing.

It is recommended that EUB field and head office staff be available as a resource to the parties and the neutral mediator on request for both the Preliminary ADR Meeting and subsequent mediation. Staff are able to:

- Act as an impartial source of information about the issues in dispute including scientific and technical information
- Provide information about EUB policies, rules and practices
- Provide fair and impartial guidance to parties about the likely approach of EUB management and/or the Board to any particular issue.

It is recommended that the EUB create a position for a Coordinator of ADR Services. The person in this role would be responsible for implementing the ADR initiative.

Questions were raised during the consultation process of how mediated agreements would be enforced. When terms of the agreement are within the EUB's own guidelines, no concern is anticipated. Some situations may not be as straightforward. In those cases, beginning with the Preliminary ADR Meeting, the mediator and the EUB staff should alert parties to possible enforcement concerns. The parties must be encouraged to clarify, if necessary, enforcement options appropriate to their situation.

The costs for parties in mediation include direct costs for a mediation service provider and a mediator, as well as reasonable costs for legal counsel. Other costs related to specific expert and technical information could arise.

It is recommended that the EUB undertake further consultation on how this settlement process will be funded.

Training Program:
EUB staff will be expected to take a more active role in facilitating issues that arise between industry and land owners and between industry members. They will also be involved in assessing situations for mediation. To do these competently and consistently, it is recommended that staff participate in an EUB developed training program for conflict resolution, facilitation skills and mediation awareness.

It is also recognized that facilitation and mediation efforts would be well supported if a culture of interest-based conflict resolution exists within the EUB. It is recommended that all EUB staff participate in several days of related training.

Finally, industry, land owner and public stakeholders are encouraged to acquire training and education in interest-based dispute resolution processes.

Communication:
It is recommended that a comprehensive communication plan involving external stakeholders be developed to support this initiative.

The consultant's expect that this EUB ADR System will, with minor modifications, prove to be equally useful for operational issues.

1.0 Introduction
1.1 Mandate

The consulting team was requested to provide specific information, recommendations and results as identified in the Terms of Reference contained in the October 1999 Request for Proposal. In summary form, these are:

Policy and Legislative Options

"Include a list of specific legislation/regulations and consolidate and highlight various options for consideration, including, if necessary, a set of draft regulations."

Awareness and Education

"Draft a guide or brochure that will lead industry and the public through the facilitation and mediation process. Address who should publish the documents."

Communication Options

"Review the content of discussions currently used by EUB staff and draft a brief document to guide EUB staff in their discussions with the public and industry."

EUB Staff Training

"Develop an outline for facilitation and mediation that could be sent to various parties for bid."

Mediation Screen Criteria

"Draft a list of criteria for use by EUB staff and others to evaluate the prospects of facilitation and mediation and how the dispute should be addressed."

Timelines and Requirements

"Work with EUB staff to establish a set of guidelines for facilitation and mediation and how it can be incorporated into existing processes. An Informational Letter and additions to EUB Guide G-56 should be drafted."

Roster

"Establish a framework for roster including: mediator or service provider qualification, style, experience and knowledge of the regulatory process; mediator or service provider selection and maintaining the roster. Provide recommendations on the need and processes to select a roster candidate based on their particular style and background. Processes to track cases and input summary information into a database must be considered."

Confidentiality and Enforcement

"Establish a framework such as an "agreement to mediate" that the EUB could suggest be followed. Also recommend a process to follow regarding confidentiality and enforcement."

Database and Performance Measures

"Develop a database and associated communications."

1.2 Methodology

The consulting team used an interest-based process to undertake this project. This methodology involved the clear identification of the issues, in this case the deliverables, and sub-issues raised by stakeholders. Following that was the step of gathering and understanding of the needs and concerns of affected stakeholders. Proposed solutions are offered in the form of recommendations and are based as much as possible on a consensus of these interests brought forward by stakeholders. This process ensures that stakeholders have an active and integral role in creating a dispute resolution system for their use.

The following is a summary of the consultation activities:

- Regular meetings with the Steering Committee on January 10, January 31 and March 1, to present proposals, create discussion and receive and incorporate feedback.
- Consultation with affected stakeholders, such as CAPP, Alberta Surface Rights Federation, Farmer's Advocate, CAPL, SEPAC, SPOG, Wild Rose Agricultural Producers, environmental groups and members of the public.
- Research of existing processes and policies within EUB and in other organizations and jurisdictions (see Appendix 2).
- Review of current literature on conflict resolution system design.
- Interviews with EUB Executive Committee members and some Board members to identify particular concerns regarding the ADR initiative.
- Consultation with EUB staff to gather information and test ideas.
- Working meetings with staff from EUB Law Branch to ensure recommendations fit with existing EUB processes.
- Consultation with the ADR Working Committee of Dispute Resolution Professionals, approximately every two weeks.
- Participation in the Energy Sessions of the Chamber of Commerce, Conflict Solutions 2000 symposium.
- Preparation of Consultant's Report.
- Review of Draft Consultant's Report with Steering Committee on March 20, 2000.

2.0 EUB Appropriate Dispute Resolution System

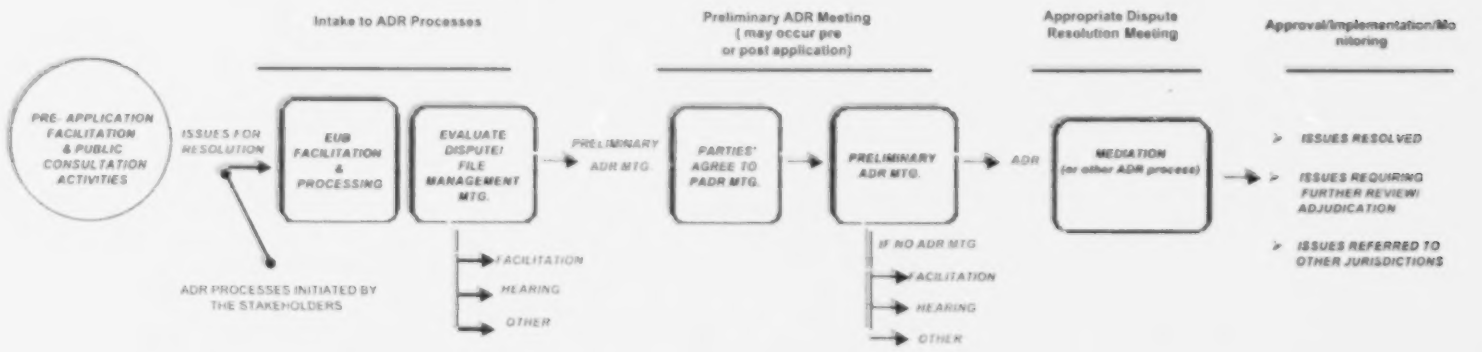
2.1 Flowchart

EUB

Alberta Energy and Utilities Board

May 1, 2000

APPROPRIATE DISPUTE RESOLUTION PROCESS



FACILITATION

- Facilitation by EUB / industry staff
- Great majority of issues resolved at this stage
- EUB staff can access private mediators
- Additional training and information materials will be available for EUB staff

INTAKE

- EUB staff will encourage issue resolution prior to application
- If concerns remain unresolved, EUB will consider recommend other options
- Mediation screen criteria will be consulted
- Decision may be made to initiate a PADR mtg.
- Parties informed - funding parameters established generally applicant will cover ADR costs.

PRELIMINARY ADR MEETING

- May occur pre or post-application
- Pre-application usually initiated by parties
- Post-application usually initiated by EUB
- EUB staff may attend for info / advice
- PADR meeting will be facilitated by a professional and attended by parties with necessary authority
- PADR will consider methods to resolve dispute eg mediation, hearing, additional negotiation
- PADR will establish basic rules for follow-up ADR mtg., e.g. confidentiality, funding, and "science"

ADR MEETING

- ADR (usually mediation) meeting will resolve as many outstanding issues as possible
- Will be led by professional mediator chosen by parties
- EUB staff may be requested to invite representation from other government bodies as necessary

2.2 Preliminary ADR Meeting

2.2.1 Purpose of the Preliminary ADR Meeting

The purpose of the Preliminary ADR Meeting is to bring together potentially affected parties to discuss the nature and extent of their dispute and to plan possible options for resolution. The parties, with the assistance of an experienced ADR professional, will clarify their issues and discuss together matters of process and system design.

In most cases, the parties themselves, often with the active encouragement and assistance of EUB staff will engage the Preliminary ADR Meeting. EUB staff will help parties with their individual level of knowledge and their willingness to participate. They will also assist the parties with the selection of an ADR professional.

The ADR professional will assist in addressing parties' willingness and knowledge and handle all the logistics associated with convening a Preliminary ADR Meeting. Most service providers will have recognized expertise in this area available to them and can be engaged by the parties to assist as needed.

The Preliminary ADR Meeting is a critical first stage to an effective mediation or other form of ADR and can be utilized pre-application, post-application and for operational issues.

2.2.2 Conducting a Preliminary ADR Meeting

The Preliminary ADR Meeting is intended to be as flexible as possible given the circumstances of each case. In some cases, the parties will need a simple Preliminary ADR agreement before the meeting (see Appendix 4c for an example). With the guidance of the ADR professional, the parties may address:

1. How to identify and engage the right parties, including the right level of authority.

2. How information will be obtained and utilized including science and technology and how disclosure will be handled (see Appendix 3).

3. What costs are associated with all aspects of ADR, including science and technology.

4. How those costs will be managed and who will pay them, having regard to the intervenor funding guidelines.

5. What role, if any, should EUB staff or experts play.

6. What role, if any, should legal counsel and other expert advisors play.

7. How to identify the best mediator or other ADR professional for the process designed by the parties. The ADR professional at the Preliminary ADR Meeting may be able to continue or the parties may make a different choice.

8. How to create an ADR agreement that commits the parties on issues such as:
   a. meeting in good faith and in a bona fide attempt to reach a resolution.
   b. confidentiality, privacy and without prejudice discussions.
   c. mechanisms for enforcement of any agreements reached.
   d. impact on timing to hearing, if any.
   e. the logistics of the next process including timing, duration, location.
   f. necessary rules or procedures for the conduct of the future mediation or other ADR process.

9. How to identify situations that may be beyond the EUB jurisdictional mandate or where jurisdiction overlaps with other agencies/authorities and create plans to manage that.

10. In some cases, parties may begin to identify their interests and clarify the difference between positions and interests.

2.2.3 Outcomes of a Preliminary ADR Meeting

When parties effectively participate in a Preliminary ADR Meeting, they will be able to make an informed decision on how best to proceed. Flexibility means:

- In some cases, the design work will be completed quickly and parties may go on to settle their dispute in the meeting.
- Other cases may be much more complex and may require longer meetings or even several meetings to complete the design stage.
- Preliminary ADR Meeting's should be held expeditiously and should not delay the hearing process unless the parties agree to those delays.
- An informed "no" and a decision to proceed to a hearing is a perfectly acceptable result to a Preliminary ADR Meeting.
- Even in cases requiring hearing, the parties may well have streamlined the hearing process, saving considerable time and resources for all concerned.
- In most cases, the parties will have created and executed an Agreement to Mediate (or other process), which sets out the rules of engagement (See Appendix 4 for samples).

Recommendations:

1. **EUB policy should clearly and strongly support the holding of an early Preliminary ADR Meeting.**

2. **This policy should be clearly communicated to all stakeholders.**

3. **The EUB should commit sufficient resources to permit staff and technical expert participation.**

4. **The industry should be prepared to cover the costs associated with this meeting for logistics, the mediator or ADR professional and the land owner's lawyer (see 2.4.2 Funding Recommendations).**

5. **EUB communications should encourage parties to create "complete agreements" and to address:**
   a. **conditions regarding privacy, confidentiality and without prejudice communications;**
   b. **conditions regarding enforcement and jurisdiction; and**
   c. **conditions regarding funding.**

2.3 Mediation Event or Other ADR Process

The Preliminary ADR Meeting has been deliberately kept very flexible to allow parties to create their own unique variation on the theme of collaborative decision making.

"Appropriate" Dispute Resolution implies choice and the flexibility to meet parties' needs. Appendix 5 contains descriptions of accepted processes that are currently considered part of ADR.

Negotiation	Mediation
Settlement Conference	Neutral Evaluation
Non-Binding Arbitration	Binding Arbitration

This list is not exhaustive and in some cases, more than one process may be used for different aspects of the same conflict. For example, in "Med/Arb", the parties combine the collaborative features of mediation with the adjudicative features of arbitration to keep parties moving towards a complete solution.

In a sense, the EUB hearing process is a form of Appropriate Dispute Resolution as is our court system.

In most cases, the resulting process from the Preliminary ADR Meeting will be mediation.

> "Mediation is a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making, through use of a variety of skills and techniques, to assist the parties to reach an outcome to which each of them can assent."[2]

Considerations for different result paths from a mediated agreement are discussed below:

1. All issues under discussion are resolved within the context of the application.

   In this case, which is likely the most common, the applicant will revise the application to reflect the agreement. The revised application would be routine and processed and approved through the normal process. Failure to comply with any of the conditions of the approval could result in possible enforcement action by the Board, if not resolved by the parties.

[2] L. Boulle and K. Kelly, *Mediation Principles, Process, Practice*, Butterworths, Toronto and Vancouver, 1998

2. Some or all of the issues remain unresolved.

When issues are left unresolved, the parties and the EUB will have to determine the most effective way to reach a settlement. Although further discussions or techniques (for example, establishment of an expert panel) may be pursued, proceeding to a hearing is likely. The hearing date may already have been set pending the outcome of the ADR event.

It is expected that even in cases where some issues are unresolved, the number and/or complexity of the decisions to be reached by the EUB will have been substantially reduced by the face to face discussions in the ADR event.

2.4 EUB Policy Requirements

The consultant's mandate includes regulatory change, however, the feedback we have received from industry and public stakeholders and from EUB management and staff, urges a cautious approach over a trial period. We are, therefore, not contemplating recommendations for legislative change, but we will be addressing changes to EUB regulations, policies and procedures.

2.4.1 Getting Parties to the Table – A Voluntary Approach

Commentary:

It is critical for the EUB Appropriate Dispute Resolution System to be perceived as fair, neutral and balanced by stakeholders and the public. In an environment where establishing trust amongst the parties may be a challenge, it is important they can at least trust the neutral process in which they have been invited to participate.

Most of the input (from public and industry stakeholders and from EUB staff and management) supports a strong policy commitment by the EUB to mediation and dispute resolution and to a Preliminary ADR Meeting as the first stage of the process. This Preliminary ADR Meeting will, in most cases, be seen as a time and cost effective safe first step for the parties. It should be the subject of much less resistance than a full mediation or other ADR process and will allow the parties to design their own next steps.

In considering whether the EUB process should be mandated or not, we heard the following concerns:

- The perceived neutrality of the Board may be negatively impacted;
- Parties may see their "rights" as adversely affected;
- The EUB may be obligated to create and enforce negative consequences and address compliance issues;
- Forcing attendance may impact a party's willingness to participate effectively;
- Mandating both industry and public stakeholders would require a change in legislation;
- Mandating only industry via Board rules is seen as one sided and unfair;
- Pre-application mandating of even a Preliminary ADR Meeting may harm Guide G-56 public consultation processes currently required and cause delay.

The supporters of a mandated system refer to a number of regulatory agencies and courts in various jurisdictions that have adopted forms of mandatory mediation. Their experience to date suggests that the benefits of ensuring the parties meet face to face may outweigh the concerns.

We have chosen a cautious approach.

In the end, the consultants felt that for the time being, a strong recommendation by the EUB would be very persuasive to both industry and public stakeholders and would get the parties to

the table for a Preliminary ADR Meeting in the vast majority of cases. The system can always be made mandatory in the future, if required.

Recommendations:

1. **The Board issues a Policy Statement clearly stating their commitment to the use of facilitation, mediation and other collaborative dispute resolution processes.**

2. **This EUB policy "strongly recommends" that affected parties attend and participate fully at a Preliminary ADR Meeting.**

3. **This EUB Policy should further acknowledge that for pre-application cases, the parties can chose to do a Preliminary ADR Meeting or any form of ADR and that this choice is supported by the EUB.**

4. **The Board's commitment be communicated to all stakeholders through the Board's information circulars, general bulletins and other accepted communication efforts with industry and public stakeholder groups.**

5. **EUB staff and senior management should strongly encourage parties to attend and participate in a Preliminary ADR Meeting through direct contacts with stakeholders as required.**

6. **The EUB should make sure that Guide G-56 requirements for pre-application cases reflect the EUB's support for the choice of early ADR.**

7. **The EUB should monitor their ADR initiative and be prepared to reconsider the issue of a mandatory system as part of their ongoing assessment.**

2.4.2 Funding

Commentary:

The EUB process for all non-routine applications currently incorporates "Intervenor Funding" that covers hearing costs for stakeholder participants who are "directly and adversely" affected by an application.

Intervenor funding is intended to assist public intervenors to participate on a fair and equal basis with the industry applicants and is funded by that applicant in appropriate cases.

The established practice for intervenor funding makes it unlikely that intervening parties will cover their own dispute resolution costs once inside the EUB system. This reflects the current anomaly of being paid to fight, but not to settle.

Public interest groups and particularly environmental groups strongly feel that their participation should also be funded in appropriate cases.

Industry stakeholders acknowledge the need for a "fair system" that supports the involvement of public stakeholders; however, they have expressed some concerns.

- They want an opportunity to assess the costs before being committed to full payment and this is especially true in the pre-application stage.
- They want to avoid time delays.
- It is important that science and technology costs be carefully managed so as to avoid waste and duplication.
- Payments should be limited to proper parties (i.e., those directly and adversely affected).

The types of costs expected to be associated with this EUB dispute resolution initiative include:

Preliminary ADR Meeting

1. Direct costs for the services of a service provider and/or ADR professional including:
   - Service provider and/or ADR professional fees
   - Travel and related expenses
   - Facility and related charges

2. Reasonable costs for legal counsel for the Preliminary ADR Meeting.

It is anticipated the Preliminary ADR Meeting would be of limited duration and costs. In most cases, these fees and expenses should be less than $2,500.00 and would be known up front.

Mediation or Other Process

If the parties agree to proceed to a mediation or other collaborative process, there could be additional costs for:

- Service provider and/or ADR professional fees
- Lawyer fees and related expenses
- Expert advisor fees and related expenses
- Costs to address required scientific or technical issues

We again chose the cautious approach. The reality is that this process will not likely work unless industry funds it effectively. Again, we emphasize that in most cases, the Preliminary ADR Meeting costs will be nominal and an excellent place for all parties to assess the costs of continuing the ADR initiative, including science and technology.

Recommendations:

1. **The EUB should strongly encourage the industry to fund at least the Preliminary ADR Meeting costs.**

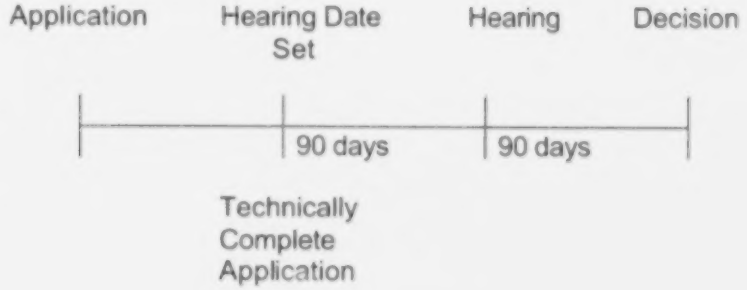
2. **The EUB should encourage parties to address in their Preliminary ADR Meeting creative and effective methods for managing costs including those associated with science and technology.**

3. **In pre-application cases where a Preliminary ADR Meeting is appropriate, the EUB should encourage industry to fund reasonable costs in order to even the playing field.**

"Simple risk analysis tells me I am better off funding a proactive mediation process rather than a long and expensive hearing." Quotation from industry representative.

2.4.3 Time Lines

Flow Chart B – Performance Targets



Commentary:

Industry has been very clear and consistent in its call for guidelines for timing. They expressed concern with the existing level of uncertainty about the length of time from Application to Decision.

For the proposed ADR process to be a viable alternative to the current hearing process the time required between initial public consultation by the applicant and a final decision should not be negatively impacted without the parties concurrence.

It should be remembered that ADR, as well as expediting decisions in the ideal situation, also offers the promise of "better" decisions. There may be situations where it is preferable to take additional time to reach a better decision.

Issues:

1. The current process often requires two to three months from application to a hearing and another one to three months until a decision is rendered. If the parties recognize that it may take up to six months for a decision, the nature of which will not be known until rendered, the benefit of a collaborative ADR approach becomes clear.

2. Mediation could operate during the preparation time leading up to the hearing or after a hearing date has been set. It would require the parties to be involved in the mediation process at the same time they are preparing for the hearing, and such a situation could result in costs being incurred for a hearing which is avoided at the last minute. It is preferable if the mediation takes place as early as possible as this is consistent with industry's public consultation obligations.

3. The proposed ADR System would normally require, from the time a decision is made to schedule a Preliminary ADR Meeting:
    - up to two weeks to convene and hold the Preliminary ADR Meeting or other process.

- up to two weeks to schedule the first mediation meeting after the Preliminary ADR Meeting. Scheduling of subsequent meetings would be the parties' decisions as would the impact such a meeting would have on the scheduling of a hearing date.

4. It must be remembered that a successful ADR allows the stakeholders to clarify and priorize issues cooperatively. If a company's overriding objective is to obtain approval quickly then they can put that issue on the table and work with the other parties to achieve it.

The consultants recognize the timing issue is an ongoing challenge for the EUB. Our recommendations are intended to foster further dialogue on this issue while effectively dealing with its impact on our design work.

Recommendations:

1. **The EUB policy statements in support of dispute resolution clearly and strongly state that time to hearing will not normally be negatively impacted unless the parties agree. The objective of the ADR initiative is that there will be no time lost between the beginning of the consultation process and a final decision whether it is reached by ADR only, a hearing, or a combination of both.**

2. **The Preliminary ADR Meeting be recommended to be held either prior to filing an application or within 30 days after filing.**

3. **The parties' ability to address timing issues in the Preliminary ADR Meeting and the communication of their views thereon to the EUB as part of the process for setting dates for hearing be acknowledged and formally recognized.**

4. **On the issue of timelines, it is suggested that the following be considered as performance objectives:**
   a. **Set a 90 day time guideline for the period from non-routine application filing for the industry applicant to have a technically complete application (See 2.4.3 Flow Chart B).**
      - **Failure by the industry applicant to have a technically complete application could result in the EUB tabling the application or in appropriate cases requesting the applicant to start again when better prepared.**
      - **It is understood that the public consultation requirement is not part of this notion of "complete". Complete in this case means that within the current EUB rules, it is ready to have a hearing date set.**
   b. **After a hearing date is set, hold the hearing within 90 days.**
   c. **After hearing, grant a decision within 90 days.**

5. **In cases where these guidelines cannot be met, the EUB should communicate as early as possible with all the parties to set realistic deadlines.**

2.5 EUB Staff Role in the ADR System

2.5.1 Staff Facilitation Guidelines

Commentary:

Although industry is responsible for effective consultation with the public, staff can complement this with facilitation efforts.

A facilitator is a leader of an informal problem solving process. The role of a facilitator is to encourage participation in this process by relevant parties, manage their input and guide the creation of an effective resolution. EUB facilitators are also, in effect, a party to the resolution process because they represent the regulatory body that sets standards and policies affecting the parties.

Overall principles for effective facilitation of EUB related disputes:

- When disagreement or potential disputes between industry and public are identified, the earlier facilitation efforts are made the better.
- Parties need information to negotiate effectively; this includes information on EUB requirements, previous decisions and the decision process and information the parties require from each other.
- Parties require a clear identification of the issues that they need to resolve together.
- Parties need to know their concerns have been heard and understood before they will be ready to commit to a solution.
- Enduring solutions or agreements are the ones which parties themselves have identified and created.

An excellent document, "Staff Role in Conflict Resolution", was prepared by EUB staff in March 1999. This document describes EUB staff roles and responsibilities in conflict resolution and particularly, facilitation. This is attached as Appendix 6.

Guidelines for Facilitation:

The following guidelines for effective facilitation are intended for field surveillance staff in pre-application or operational situations and applications staff in non-routine applications. This is not intended as an exhaustive checklist, but rather as a suggested process to follow. As well, these guidelines are useful for situations when staff have the capability and time. When matters are complex, controversial or involve many parties, the people involved could be encouraged to consider mediation and a Preliminary ADR Meeting. See 2.5.2 Mediation Screen Criteria for more information on assessing situations for mediation.

Facilitation efforts are most effective when all parties are able to meet in person; however, it is recognized that the use of phone calls and correspondence manage a significant amount of problem solving.

1. Identify and contact the potentially affected parties.
   - Determine the content and nature of the discussions they have had to date.
   - Provide additional information as required, i.e., technical information, recent relevant board decisions.
   - Determine their willingness to continue with a facilitated process.
   - Determine how the process will continue, i.e., meetings, conference calls, telephone contact.

2. Work with parties to clearly identify the issues they need to resolve together.
   - Draft these issues into an agenda, using neutral, mutual language.
   - Work with parties to set priority for examining the issues.
   - Explore with parties the facts and implications related to those issues.

3. Have parties articulate their concerns in regard to the issues. If face to face, ensure communication is balanced and non-confrontational.
   - Work to develop understanding among parties of the identified concerns.
   - Present EUB policy regulations and guidelines regarding the issues being negotiated and ensure parties understand them.

4. As parties work towards agreement, assist them in ensuring it is clear and complete
   - Help the parties test the reality of their agreement.
   - Have parties determine the process they will use if they need to consult or negotiate with each other again.
   - Inform internal customers of facilitation efforts.

Recommendations:

1. **EUB staff involved in assisting land owner and industry people to resolve issues should be trained in conflict resolution and facilitation.**

2. **As part of the training program, staff develop their own specific facilitation guidelines from the outline provided above and the document prepared by EUB staff.**

2.5.2 Mediation Screen Criteria

Commentary:

The EUB has a significant history of effective facilitation with all of its stakeholders. It is important that this be maintained and enhanced. Very fine work has already been undertaken by EUB staff on facilitation as referenced above.

The objective for a screen criteria is to guide EUB staff and managers in the decision to involve external dispute resolution resources.

This assessment process will likely arise while facilitation is ongoing and will vary case to case. It will be impacted by staff's sense of their own resources, time, and skills, as well as their assessment of the particular dispute in question.

There are a number of guiding principles that must be considered:

1. Early is better than late!

   Most cases will benefit from early facilitation before parties have become entrenched in their positions. An early Preliminary ADR Meeting is an excellent opportunity to discuss with parties how to deal with their unique issues and interests and bring them to an informed decision.

2. Assume success and ask "why not?"

   Most disputes benefit from effective facilitation and mediation. Start with the belief that it will be successful and then work to see if roadblocks and resistance can be overcome.

3. Use your best judgment

   In spite of the need for criteria and guidelines, dispute resolution is as much an art as a science and any criteria and guidelines must recognize the need for experienced staff to use their discretion and intuition.

Recommendations:

1. **Staff and management use a simple checklist as a quick guide. See Appendix 7.**

2. **In situations requiring a more in-depth analysis by experienced EUB staff, we recommend Appendix 8.**

3. Both these quides should be reviewed by staff during their facilitation training with a view to incorporating their collective experiences into the final drafts.

4. Staff should be able to contact a service provider or experienced ADR professional for further guidance and assistance in appropriate cases.

5. If staff working with parties utilizes these questions, the information gathered can be very useful to an ADR professional in a subsequent Preliminary ADR Meeting and should be made available.

2.5.3 Staff Role in Preliminary ADR Meeting and Mediation Event

Commentary:

EUB staff and management are not "neutral". The mandate of EUB in its regulatory role will always position its staff as a "party" that must consider the EUB's role and responsibilities as part of the discussions.

In order to maintain public trust, the EUB and its staff must be, and be seen to be, "fair and impartial".

"Fair" relates to how parties are treated by staff and their availability to the parties.

"Impartial" relates to having no bias in favor of any side in a conflict.

In their own facilitation activities, staff must always be cautious of parties' perceptions so as to avoid any situation that might appear to prejudice the Board's adjudicative role.

Staff involvement in EUB dispute resolution is important because they are able to:

- Act as an impartial source of information about the issues in dispute including scientific and technical information.
- Provide information about EUB regulations, informational letters, interim directives, policies, rules and practices.
- Provide fair and impartial guidance to parties about the likely approach of EUB management and/or the Board to any particular issue.

The ADR professional in either the Preliminary ADR Meeting or in the subsequent mediation is accepted as a "neutral". This person can frame the input of the staff in its proper impartial context and protect the staff role from misinterpretation.

Recommendations:

1. **EUB field and head office staff are available as resource to the parties and the ADR professional on request for both the Preliminary ADR Meeting and subsequent mediation.**

2. **EUB staff can assist the ADR professional to facilitate an effective resolution as long as the parties properly understand their role.**

3. The role of staff in dispute resolution is clearly stated to:

   - Act as an impartial source of information about the issues in dispute including scientific and technical information.
   - Provide information about EUB regulations, informational letters, interim directives, policies, rules and practices.
   - Provide fair and impartial guidance to parties about the likely approach of EUB management and/or the Board to any particular issue.

4. EUB communication material clearly supports and outlines the availability and the role of its staff.

2.5.4 Coordinator of ADR Services

Commentary:

The incorporation of ADR processes into a modern regulatory agency poses a number of challenges. Quasi-judicial tribunals have developed procedures to incorporate their authority into the context of the industry they control. Changing the focus of decision making methodology, even in a minor fashion, forces new approaches and structures to be evolved. In addition staff have learned to operate in a particular manner based on traditional business practices and even adequate training programs must be reinforced by a changed business culture and sufficient time for new experiences to be gained.

Implementing innovative programs such as the ADR initiative will unavoidably create some friction within the system. Staff and managers will be feeling their way and establishing precedents and new procedures with each new ADR process that is undertaken. The tendency when facing organizational growing pains is to fall back on previously established procedures rather than moving ahead in modifying the system to permit the changes to become incorporated and the normal way of doing business.

Some stakeholders, often out of frustration from the results of their own actions and in spite of contrary evidence, will always criticize the system for taking an unreasonably long time and then reaching the wrong decision. Such voices will always be heard and although such concerns must be considered, great care must be taken in assigning responsibility.

The ADR initiative has the potential to greatly improve relations between stakeholders, expedite decisions, improve the quality of decisions and provide effective mechanisms to deal with operational and enforcement issues in a much more convenient fashion.

The initiative will require a management presence at a level capable of being heard at the senior levels of the EUB for at least the three year initial implementation period.

Recommendations:

1. **The EUB create a "Coordinator of ADR Services" position which will be responsible for the ADR initiative including:**

   - **monitoring of the ADR program including reporting to the Board Advisory Committee and EUB,**
   - **recommending/implementing modifications to the program,**
   - **monitoring ADR training initiatives for EUB staff and mediators,**

- monitoring and overseeing the service provider,
- identifying opportunities for ADR to be used and contacting parties considering ADR to encourage their participation,
- arranging attendance of appropriate EUB staff at Preliminary ADR Meeting and mediation,
- coordinating communication with the media on ADR initiatives,
- liasing with other government departments and agencies to arrange technical input and representation where appropriate,
- ensuring proper follow-up occurs to settlements reached through the ADR processes,
- continuing research on innovative decision-making methodologies.

2.6 The Role of the Service Provider

EUB cases will vary in complexity and parties will have different levels of understanding about what a Preliminary ADR Meeting or a mediation involves, and also varying degrees of willingness to participate.

In the early stages, these issues will become apparent to EUB staff in their facilitation role. In simpler cases they will handle concerns about the ADR proposal as part of their recommendations to the parties about using the EUB's ADR System.

In the more complex cases, there is need for additional assistance with a number of set up issues including:

1. Knowledge and willingness – selling the ADR approach:

    - Parties may need to address with someone even prior to the Preliminary ADR Meeting issues of:
        - Trust
        - Anger and frustration
        - Authority
        - Preparation
        - Information exchange
        - Role of EUB

    - Parties at this stage will often be unclear about how the proposed ADR initiative can help them get their interests met and in some cases, they will be unclear about what their interests are.

2. Logistics and administration:

    - Parties need to agree on and document practical matters such as:
        - Timing and duration
        - Location
        - Facility arrangements
        - Travel
        - Cost estimates

3. Preparation and ongoing coaching:

    - Since parties will vary in knowledge and experience, there is an opportunity for ongoing coaching. This may be as simple as answering questions or may include:
        - Guidance on case preparation and negotiation strategies
        - Guidance on information exchange and creative information management

4. Selecting an ADR professional:

- Parties need to make informed decisions about their ADR professional. The EUB ADR System is designed to be flexible; therefore, this choice may not always be easy or obvious.

5. Reporting and Performance measurement:

- The EUB wants to track and evaluate results as an integral part of their long term commitment to fielding the best ADR system. This information is critical to demonstrating results and selling the system over time to all stakeholders.

Done well, these activities will significantly enhance the parties' participation and in the end the results achieved in both the Preliminary ADR Meeting and the mediation event.

Cases will also vary in logistical complexity driven, in part, by the number of parties, their location and the complexity of their issues.

These challenges must be addressed efficiently for the ADR process to be successful.

Some of this work may be part of the role of the EUB's Coordinator of ADR Services and EUB staff. In some cases, this work may be done by an ADR professional as long as the parties can agree on selection and assuming this person has the skills, interest, time and resources to conduct this preliminary work. It is also very important that this work be done in a way that preserves the neutrality of the ADR professional and the impartiality of the EUB.

Another option is to have this work handled by a service provider. A service provider is a company or other external organization with recognized knowledge and expertise in this area. The elements of a service provider role could include:

- A completely neutral resource to parties in a dispute to handle issues 1. through 5. above.

- A consulting resource to EUB staff for guidance and assistance (coaching) for their ongoing role of facilitation.

- An independent source of performance data both subjective and objective to the EUB and other stakeholder groups.

Recommendations:

1. The EUB, through the Advisory Committee, include as part of its Roster process, a call for proposals from service providers for inclusion on a "Service Provider Roster".

   The criteria for inclusion should include:
   - Demonstrated experience and expertise in ADR system design, management and case building.
   - Working knowledge of the EUB regulatory system and its stakeholders.
   - Working knowledge of the various ADR professionals on roster or otherwise available for the EUB ADR System.
   - Professional references supporting the service provider's ability to manage the ADR systems set up.
   - An acceptable database, performance measurement and reporting system.

2. The EUB Coordinator of ADR Services role includes guiding the use of the service provider roster and the mediator roster to best deliver the ADR service to stakeholders and maintaining neutrality and the EUB's regulatory role.

2.6.1 Roster

Commentary:

Skilled mediators are integral to an effective ADR program. Using third party professionals has the important benefits of emphasizing the neutrality of the mediator and avoiding any appearance of bias. Using contract personnel is also a more flexible and cost-effective way of providing the ADR service.

To be able to provide parties with a choice of mediators and recognizing geographic constraints, the EUB program will create a roster of qualified mediators.

Parties proceeding to an ADR process to resolve their dispute will be encouraged to identify a mediator acceptable to them, with the appropriate background in mediation and some familiarity with the oil & gas industry and the stakeholder industries. Recognizing there are a limited number of such individuals in the province, the roster will provide an important resource for parties wishing to choose a mediator.

The roster will be designed to provide the EUB and stakeholders with a list of mediators who have relevant training, sufficient experience and who have expressed an interest in the EUB program.

Criteria:

Mediators on the roster will be required to have:

- Subscribed to a code of ethics or conduct of a relevant professional association or society (see Appendix 9).
- A working knowledge and sufficient training in interest-based dispute resolution techniques (such as the Alberta Arbitration & Mediation Society's Level 2 Mediation).
- Documented experience.
- Two references.
- Appropriate insurance coverage.

Parties to an ADR process will have the option to choose a mediator from their own experience who is acceptable to all parties. They should be encouraged to make sure their choice has appropriate skills and experience.

For each mediator, the format of the roster will include:

- Name, address and contact information.
- A brief description of credentials and experience.
- Two references.

The roster should be maintained by the multi-stakeholder ADR Advisory Committee with the

assistance of the Coordinator of ADR Services. A service provider could facilitate the parties' informal choice of mediator and, when required, can design for the parties a process to address a selection impasse (see 2.6 The Role of the Service Provider).

Recommendations:

1. **The EUB establish a multi-stakeholder ADR Advisory Committee with members from various stakeholder areas. The Committee will be responsible for matters such as reviewing the qualifications of mediators and assuring a high level of competency among those chosen for the roster, determining the numbers of mediators on the roster and adding and removing mediators from the roster as necessary.**

2.7 Enforcement

Commentary:

The issue of how to enforce mediated agreements is a challenge for the EUB. It is important to understand that the very goal of an ADR initiative being a more "complete agreement" is at the same time both the problem and the solution.

More complete and therefore more creative agreements may result in terms to the agreement that:

1. Are beyond the EUB's jurisdiction and therefore beyond its power to enforce.

2. Involve terms that impact the EUB's own regulations and directives in ways that are not acceptable to the EUB.

3. Are side deals for which no regulatory agency has authority.

4. Involve situations in which the EUB regulations do not allow for remedial measures to address future non-compliance.

Mediation is the best way to create more complete agreements and beginning with the Preliminary ADR Meeting, the ADR professional and the EUB staff must guide parties through these enforcement challenges.

The parties must be encouraged to clarify in their agreements the jurisdiction issues and plan for enforcement options appropriate to each case.

Where overlapping jurisdiction has been identified, the parties with the assistance of the mediator, service provider or Coordinator of ADR Services may invite appropriate representation from other agencies to attend and participate in creating a solution.

The bottom line for all participants is the reality that the EUB's current legislative mandate will prevent it from enforcing some aspects of negotiated agreements. As long as the parties understand these limitations, they will have an opportunity to design their own solution or, from an informed place, choose to proceed in spite of this limitation.

Recommendations:

1. **EUB staff are made available to the parties to assist with identifying and addressing enforcement issues.**

2. **The parties are encouraged to identify and address these concerns in their Preliminary ADR Meeting and subsequent mediation(s).**

3. **The parties be advised to address these issues in their final agreement.**

2.8 Jurisdiction

This problem is a close companion of enforcement. The solution again requires the parties to create a more complete agreement.

At the same time, it makes sense to engage other regulatory agencies in ongoing discussions to address overlapping jurisdictions and cooperate in finding ongoing solutions.

Recommendations:

1. **The EUB Board and management initiate discussions with related agencies such as the Surface Rights Board and Alberta Environmental to work towards greater cooperation.**

2. **Particularly with these two Board's, there should be a sharing of the objectives of the EUB ADR System and an attempt to negotiate protocols with those bodies to facilitate the attendance of relevant staff at ADR meetings to support the creation of a more complete agreement.**

3. **The EUB should invite representation from these Boards on its ongoing ADR Advisory Committee.**

2.9 Confidentiality, Privacy and Without Prejudice

Commentary:

The ability of participants in a dispute resolution process to discuss issues and possible solutions openly is basic to the collaborative process. To accomplish this, each party must be willing to explain their motivating interests and objectives with respect to the matter being discussed. Experience suggests that the necessary disclosure will only occur in a climate where such information is protected. Protection in reference to mediation processes generally means that the information:

- will not be revealed to commercial competitors,
- will not be used in subsequent dispute resolution steps (e.g. hearings, court) on the same or similar matters unless agreed to by the parties or required by a relevant authority (for example, the EUB Board will require all available data on some matters relevant to its mandate),
- will not be divulged to the press or the public,
- will only be revealed by the party that owns the information.

The basic principle behind dealing with confidentiality, privacy, full disclosure and 'without prejudice' discussions in a mediation is that the stakeholders establish their own rules and enforcement mechanisms. This can occur in the Preliminary ADR Meeting and, in some cases, will need to be addressed even prior to that meeting.

EUB Appropriate Dispute Resolution System

The EUB application process provides some particular challenges relating to confidentiality when using ADR approaches. In some cases, solutions may have to be presented to an EUB panel in public session, to a municipal council, or to various stakeholder organizations for ratification. Such requirements will impact any confidentiality agreements. In addition, certain matters must be communicated to the EUB and if any information presented in a mediation turns out to be untrue, the agreement may be subject to a court challenge.

There are also cases that may require transparency – openness of discussion. Issues that involve basic principles or values such as protection of the environment, human health, and places of great natural beauty, may be examples of situations where some of the parties will not accept confidentiality.

In still other cases, to protect the negotiator's position in their organization or culture, it may be preferable that the positions put forward by that party were taken away by legal decision rather than given away in the give and take of negotiation.

These are real and understandable dynamics that result from our current societal norms and they create real challenges for a process designed to reach a negotiated settlement.

Can ADR operate in an environment where parties have not agreed to confidentiality? Yes, and many matters are probably better discussed in public. If lack of a confidentiality agreement would preclude the disclosure of necessary information, parties who are serious about finding a solution to the overall problem will be able to find a solution to the question of how to keep sensitive information confidential.

Can ADR operate in an environment where all relevant information is not completely disclosed (no agreement for full disclosure)? Yes. Much time in mediation is used to encourage the parties to disclose additional information that may affect the outcome. It is naïve to assume that all parties disclose all information. When a situation arises however that a party refuses to reveal a specific piece of information, a mediator will focus on the reasons for their refusal and explore ways of addressing those concerns. If the party remains adamant, the mediation table can consider techniques such as retaining a separate firm or consultant to which the information will be revealed, for a confidential advisory opinion.

Can ADR operate in a situation in which open brainstorming and free thinking are not encouraged? Where there are no "without prejudice" agreements in place? Probably. But with much more difficulty and much more likelihood of failure. Such cases, almost by definition, become negotiated settlements based on positional arguments (like labor negotiations) rather than interest-based collaborative processes. A position-based negotiated settlement, although not as desirable and effective as an interest-based settlement, may still be much preferred to a Board hearing as it at least allows extensive face to face discussion of the issues and potential solutions among the parties.

Media Contacts

Media attention can cause difficulty to ADR processes if not expected and planned for by the parties. Most of the EUB ADR processes will not generate public interest and the ADR will simply facilitate negotiation between the parties on matters not in conflict with the EUB's basic mandate. Such negotiations may occur with whatever level of confidentiality the parties wish.

Some issues however, will generate a great deal of legitimate public interest. Raising issues for public scrutiny is an important right in a democracy that must be recognized and protected. A number of interest groups, primarily but not limited to those advocating for environmental and health concerns, view exposing of such issues to the public as one of their basic purposes. The acceptability of the dispute resolution process, for example, ADR vs. hearing, is partially measured by whether it facilitates public education and exposure of the issues. Were any constraints placed on the ability of the parties in such disputes to present their positions to the media, they may decline from using the ADR process and revert to the traditional hearing process. The hearing process, although possibly less able to respond to their interests, would at least allow a public discussion.

The key to dealing with the media is a discussion by the parties as to the objectives behind their position on the acceptable level of media exposure. When such an analysis is undertaken, creative solutions to managing the media's role can often be developed.

Freedom of Information and Protection of Privacy Act:

The Freedom of Information and Protection of Privacy Act may impact the confidentiality of mediations held under the auspices of the EUB. This has not been a practical concern to date in other jurisdictions pursuing mediated settlements, however the matter must be considered and relevant information provided to the parties.

Conclusion:

For some parties, the stronger the confidentiality controls the more attractive the ADR route, while for others the situation is reversed and openness is a prerequisite to their involvement. The mediation process is able to handle this dichotomy through negotiation between the parties as to how such matters will be handled. Effective dispute resolution can take place without agreements to ensure confidentiality, to provide full disclosure, to keep information from the media and even without allowing "without prejudice" discussions. The loss of these controls on the mediation may however reduce the willingness of the parties to disclose their interest and thereby limit the effectiveness of the process.

The basis of the ADR process is that the parties create the dispute resolution process together. If they are unable to reach agreement on these matters, then the traditional approval routes are still available.

Recommendations:

1. **Matters of confidentiality, disclosure, privacy and media contacts be addressed and determined by the parties.**

2. **The EUB Law Department prepares a statement outlining the effect of the Freedom of Information and Protection of Privacy Act on ADR meetings for distribution to participants.**

3. **In an EUB hearing, the Board panel respect confidentiality agreements, established by participants who have attempted to resolve the matter through the ADR program, to the greatest extent possible.**

3.0 Communication Plan

Commentary:

This ADR initiative encourages a stronger staff facilitation role and the use of an EUB mediation model. These are changes to how staff and stakeholders have traditionally addressed the resolution of public-industry and industry-industry issues. In any group of people, a natural response to change is resistance and a desire to continue with the status quo.

Effective communication of the proposed changes and what they will look like is a key requirement for acceptance and implementation. Staff and stakeholders need to have the change clearly communicated to them, they need to understand their role within the proposed changes and they need the opportunity to provide feedback.

3.1 Staff and Stakeholder Communication

Recommendations:

1. **A comprehensive communication plan should be developed for delivering the message of the EUB ADR System to staff. The plan should address the content of these changes and their management. The plan should include short term and long term communication needs.**

2. **A communication consultant should be contracted to develop a comprehensive plan for communicating the ADR System to external stakeholders.**

3. **The EUB should encourage stakeholders to acquire a sound understanding of mediation and training in interest-based dispute resolution.**

3.2 Brochure

Commentary:

The consulting team was requested to draft a brochure to guide industry and the public through the facilitation and mediation process. A brochure is one tool for communicating the proposed ADR initiative. A suggested content for this draft brochure is included as Appendix 10. This document can be finalized and integrated with the overall communication strategy when final direction for the ADR initiative is set.

The team was asked to consider who should publish the document to best promote user trust and acceptance.

Recommendations:

1. **Stakeholders appear to value the role the EUB plays in promoting the use of interest-based processes to resolve application and operational issues within the industry. For that reason, and to ensure a consistent message is delivered to users, it is recommended the EUB undertake publication and distribution of this brochure.**

2. **Some thought was given to whether a separate brochure should be developed for each affected group, i.e., one for land owners and one for industry. It is recommended, however, only one brochure be published to ensure consistency.**

3.3 Guidelines for Staff Pre-facilitation and Pre-mediation

In advance of parties committing to participate in facilitation or mediation, they need to be contacted and informed of available processes for resolution and be given information on how to prepare. This step is called pre-facilitation or pre-mediation and will often be conducted by staff.

The task when speaking with parties at this stage is to provide information and to listen and acknowledge the concerns they will have about their involvement. Several key points regarding further action toward facilitation or mediation need to be clarified.

1. What do the parties understand about dispute resolution processes?
   They need to know:
   - The purpose of facilitation and mediation
   - How these processes work
   - The role of an ADR professional
   - Time frames, costs, confidentiality

2. Staff need to understand:
   - The overall nature of the situation (but not the details)
   - Brief history and actions taken to date
   - Who the stakeholders are

3. What concerns do the parties have about participating in facilitation or mediation?
   - Special needs
   - Safety concerns
   - Who participates

4. How willing are the parties to continue to participate? A reluctance to participate may be due to unfamiliarity with the proposed process. Are they willing to attend and participate in a Preliminary ADR Meeting?

5. How suitable does this situation seem for facilitation or mediation? Staff should refer to Mediation Screen Criteria to make this assessment.

6. What are the next steps and who will be the contact person (staff or service provider)?

7. What preparation should parties undertake before the next step?
   Preparation to negotiate
   Information from the other party and from the EUB on regulations and from decisions in similar situations

The training program recommended in 4.1 Intermediate Training Program will further prepare staff in using the above guidelines.

4.0 Training

Commentary:

Among field surveillance, applications and other staff there currently exists varying degrees of involvement in public to industry and industry to industry facilitation. The variation is a result of different levels of interest, skill and experience of staff in facilitating resolution of disputes.

In its 2000 Budget, the EUB has significantly increased the resources that will be directed to supporting the facilitation role of staff so that more potential disputes are resolved through their efforts. This report further supports this initiative by proposing expanded training opportunities. As well, staff will be identifying dispute situations that are more suited to mediation and providing information about that process. Some staff will be participating in mediations as a provider of technical information and as an information source on EUB policy and regulations.

Methodology:

The task was to:

1. Identify the knowledge and skills gap that exists between the current level of training and expertise and future expectations related to facilitation and training for dispute resolution.

2. Develop an outline for facilitation and mediation training that can be sent to bid.

Input was gathered through:

- Review of current EUB conflict resolution, mediation and risk communication training programs.
- A focus group meeting with field and application staff representation.
- Interviews with field and applications staff.
- Interviews with staff responsible for training programs.
- Broad circulation of training needs assessment questionnaire to EUB staff and compilation of responses.

Findings:

- Corresponding to the varying level of involvement in facilitation is a varying background among staff of training in facilitation and dispute resolution skills. Some staff are well recognized for their facilitation successes and have achieved their skills primarily through extensive experience. Others have participated in a five day in-house conflict resolution and mediation training program. A few have progressed through outside training programs such as the Alberta Arbitration and Mediation Society's Conflict Resolution Program. Many have not participated in any formal facilitation training.

- Over a number of years, field staff have participated in training in Risk Communication. This training continues to be offered. Many of the concepts and skills covered in risk communication correspond with conflict resolution training.

- There is some concern among staff involved in facilitation that while their efforts in facilitation result in successes, they are unsure that their process follows an accepted facilitation model.

- Staff want to ensure there is consistency in how facilitations are conducted (for example, use of common process and language).

- Staff have expressed the desire to learn from the facilitation experiences of other staff. Connected with this is the concept of mentoring and coaching, to be able to pass onto others skills acquired through experience.

- Not all field and applications staff want to be involved in facilitation; however, much of their work involves problem solving among people and conflict resolution training can enhance their skills.

A summary of responses from the training questionnaire is included as Appendix 11.

Recommendations:

1. **Communication skills for interest-based conflict resolution and an understanding of EUB relevant appropriate dispute resolution processes be a core competency for all EUB employees. This would assist in ensuring that the culture of conflict resolution within the EUB, particularly for management of external disputes, reflects interest-based processes and skills. The currently offered two day in-house training on conflict resolution serves as an outline for this training. It is suggested this training be accomplished by late fall 2001.**

2. **All EUB staff who in any way facilitate discussions between land owners, other public representatives and industry, or between industry representatives,**

participate in a three day facilitation and mediation training program, after they have completed the above-mentioned two day conflict resolution training. This training would build on the experience and related training already acquired by staff. The desired result is competency in interest-based facilitation skills and an understanding of the use of mediation for EUB.

- A three day program is suggested as the best opportunity to integrate skills as fully as possible.
- Training should be provided off-site to minimize distractions.
- Training should be skill based and use case studies and simulations to provide experiential learning.
- Attendance per session should be a maximum of 20.
- Attendance should reflect a mix of experience and geographical location of staff.

See 4.1 Intermediate Training Program for more details.

3. Among staff facilitators there should be an identified group, selected for their inherent skills, experience and desire, who participate in additional in-depth training in advanced facilitation and mediation. This group, hopefully with wide geographical representation, would serve as in-house resource for:

   - Supporting other staff regarding challenging facilitations.
   - Conducting challenging facilitations.
   - Providing ongoing training updates and communication with staff related to facilitation.
   - Providing information for staff related to the EUB ADR System.
   - Providing information for public and industry related to the EUB mediation process.

   See 4.2 Advanced Training Program for more details.

4. Staff who facilitate problem solving should participate regularly in training updates.

5. External stakeholders be encouraged to acquire a sound understanding of the EUB ADR System and training in interest-based dispute resolution.

4.1 Intermediate Training Program

Description:

A three-day training program for EUB staff who facilitate the resolution of issues between land owners and energy companies and within industry. The program will build on the two day EUB introductory conflict resolution training already provided.

This experiential training is designed to:

1. Equip participants with interest-based facilitation skills; and

2. Provide participants with an understanding of the use of mediation for EUB matters.

It is expected the training will rely significantly on simulation exercises and case studies based on typical situations encountered by EUB staff. It is suggested that coaches be used for provision of effective feedback. Video-taped feedback sessions can also be an excellent learning tool. Approximately 2 ½ days should be spent on facilitation process and skills and ½ day on mediation.

Content should include:

Facilitation:

- Causes of conflict and disputes
- Positions, interests and issues
- Communication skills for facilitating – including listening, speaking and assertiveness skills
- The interest-based conflict resolution model
- The special role of EUB facilitators
  - use of objective criteria
  - managing emotional situations
  - handling verbal attacks
  - maintaining personal safety
  - appropriate responses for "tough", technical questions
  - coaching parties for effective negotiation

Mediation:

- The mediation model
- Role of a mediator
- Role of EUB staff in mediation
- Assessing situations for mediation

4.2 Advanced Training Program

Prior to designing an Advanced Training Program, a needs assessment should be conducted. Content for advanced training could include:

- Advanced skills for managing communication
- How to deal with difficult people with entrenched positions
- A case study review of challenging facilitations
- How to assess potentially challenging facilitation and mediation situations and coordinate an appropriate resolution process

5.0 Database and Performance Measures

An important element in ensuring the success of the ADR initiative is establishing an effective monitoring and evaluation system. As well as keeping a database of Preliminary ADR Meetings and ADR events, this system should be organized to allow entry of qualitative information regarding the techniques used and level of party satisfaction with the ADR process undertaken.

In an ADR system, success needs to be defined as more than a simple settle vs. not settles. On a quantitative basis, we suggest the tracking system should capture:

Pre-Application Stage:

- Number of pre-application referrals to a Preliminary ADR Meeting
- Number of cases that settle all matters at the Preliminary ADR Meeting, resulting in a routine application
- Number of cases that go onto mediation or other ADR process
- Number of post-ADR cases – full settlement
- Number of post-ADR cases – partial settlement of some issues
- Number of cases that go onto the non-routine application hearing system after the Preliminary ADR Meeting
- Number of cases that go on through the hearing system

Tracking these results will require the cooperation of the parties to voluntarily report these cases to the EUB system.

Non-Routine Application Cases:

- Number of cases referred to a Preliminary ADR Meeting
- Number of cases that settle all matters at the Preliminary ADR Meeting, resulting in a routine application
- Number of cases that go onto mediation or other ADR process
- Number of cases post-ADR that result in full settlement
- Number of cases that go on through the hearing system

The EUB can both directly and with the assistance of a service provider track these results on a case by case basis.

We must also recognize the value of other components to mediation that are not so easily tracked. For example, perhaps the mediation event was terminated because of a missing piece of information that once provided to the other side, settles the case. Perhaps the issues, while not resolved, are identified to a degree that the subsequent hearing is two days in length instead of two weeks. These are clearly successful outcomes, but more difficult to track.

Qualitative measures, probably in the form of surveys, need to be designed to capture:

1. Party satisfaction with the ADR process;
2. Party comments on the process, including important factors such as timing, third party professional;
3. Client assessment of the usefulness of the process for ADR that is not successful or only partially successful. For example, did the process clarify the issues and/or shorten or make more easily manageable the hearing process?

Report Formats:

The EUB, probably through the Coordinator of ADR Services, will need to design its quantitative reports and its qualitative surveys perhaps with the active assistance of a service provider. Appendix 12 is a Focus consulting report for British Columbia's Notice to Mediate system. Appendix 13 is Canadian Dispute Resolution Corporation's report format.

Cost Benefit Analysis:

Stakeholders will want to assess the effectiveness of this system. Efforts should be made to cooperate with the EUB to track the costs associated with ADR and the length of time these processes take.

Software Programs:

There are currently no purpose-made software programs available in the retail marketplace that are designed to track information at the optimal level. Such systems have been developed by one organization that is willing to discuss licensing the use to the EUB.

Service providers may have developed custom-designed software programs. The EUB could negotiate to acquire a custom system or EUB staff could develop their own software.

Recommendations:

1. **The EUB and the Standing Committee create quantitative reports and qualitative surveys for the EUB ADR System.**

2. **The EUB utilize a single spread sheet program in the early stages of its pilot project.**

3. **The data collected should ideally enable users of the system to do a cost benefit analysis wherever possible.**

Listing of Recommendations
2.2 Preliminary ADR Meeting

Recommendations:

1. EUB policy should clearly and strongly support the holding of an early Preliminary ADR Meeting.

2. This policy should be clearly communicated to all stakeholders.

3. The EUB should commit sufficient resources to permit staff and technical expert participation.

4. The industry should be prepared to cover the costs associated with this meeting for logistics, the mediator or ADR professional and the land owner's lawyer (see 2.4.2 Funding Recommendations).

5. EUB communications should encourage parties to create "complete agreements" and to address:
   a. conditions regarding privacy, confidentiality and without prejudice communications;
   b. conditions regarding enforcement and jurisdiction;
   c. conditions regarding funding.

2.4 EUB Policy Requirements

Recommendations:

1. The Board issues a Policy Statement clearly stating their commitment to the use of facilitation, mediation and other collaborative dispute resolution processes.

2. This EUB policy "strongly recommends" that affected parties attend and participate fully at a Preliminary ADR Meeting.

3. This EUB Policy should further acknowledge that for pre-application cases, the parties can chose to do a Preliminary ADR Meeting or any form of ADR and that this choice is supported by the EUB.

4. The Board's commitment be communicated to all stakeholders through the Board's information circulars, general bulletins and other accepted communication efforts with industry and public stakeholder groups.

5. EUB staff and senior management should strongly encourage parties to attend and participate in a Preliminary ADR Meeting through direct contacts with stakeholders as required.

6. The EUB should make sure that Guide G-56 requirements for pre-application cases reflect the EUB's support for the choice of early ADR.

7. The EUB should monitor their ADR initiative and be prepared to reconsider the issue of a mandatory system as part of their ongoing assessment.

2.4.2 Funding

Recommendations:

1. The EUB should strongly encourage the industry to fund at least the Preliminary ADR Meeting costs.

2. The EUB should encourage parties to address in their Preliminary ADR Meeting creative and effective methods for managing costs including those associated with science and technology.

3. In pre-application cases where a Preliminary ADR Meeting is appropriate, the EUB should encourage industry to fund reasonable costs in order to even the playing field.

2.4.3 Time Lines

Recommendations:

1. The EUB policy statements in support of dispute resolution clearly and strongly state that time to hearing will not normally be negatively impacted unless the parties agree. The objective of the ADR initiative is that there will be no time lost between the beginning of the consultation process and a final decision whether it is reached by ADR only, a hearing, or a combination of both.

2. The Preliminary ADR Meeting be recommended to be held either prior to filing an application or within 30 days after filing.

3. The parties' ability to address timing issues in the Preliminary ADR Meeting and the communication of their views thereon to the EUB as part of the process for setting dates for hearing be acknowledged and formally recognized.

4. On the issue of timelines, it is suggested that the following be considered as performance objectives:

   a. Set a 90 day time guideline for the period from non-routine application filing for the industry applicant to have a technically complete application (See 2.4.3 Flow Chart B).

      - Failure by the industry applicant to have a technically complete application could result in the EUB tabling the application or in appropriate cases requesting the applicant to start again when better prepared.

      - It is understood that the public consultation requirement is not part of this notion of "complete". Complete in this case means that within the current EUB rules, it is ready to have a hearing date set.

   b. After a hearing date is set, hold the hearing within 90 days.

   c. After hearing, grant a decision within 90 days.

5. In cases where these guidelines cannot be met, the EUB should communicate as early as possible with all the parties to set realistic deadlines.

2.5 EUB Staff Role in the ADR System

Recommendations:

1. EUB staff involved in assisting land owner and industry people to resolve issues should be trained in conflict resolution and facilitation.

2. As part of the training program, staff develop their own specific facilitation guidelines from the outline provided above and the document prepared by EUB staff.

2.5.2 Mediation Screen Criteria

Recommendations:

1. Staff and management use a simple checklist as a quick guide. See Appendix 5.

2. In situations requiring a more in-depth analysis by experienced EUB staff, we recommend Appendix 6.

3. Both these guides should be reviewed by staff during their facilitation training with a view to incorporating their collective experiences into the final drafts.

4. Staff should be able to contact a service provider or experienced ADR professional for further guidance and assistance in appropriate cases.

5. If staff working with parties utilizes these questions, the information gathered can be very useful to an ADR professional in a subsequent Preliminary ADR Meeting and should be made available.

2.5.3 Staff Role in Preliminary ADR Meeting and Mediation Event

Recommendations:

1. EUB field and head office staff are available as resource to the parties and the ADR professional on request for both the Preliminary ADR Meeting and subsequent mediation.

2. EUB staff can assist the ADR professional to facilitate an effective resolution as long as the parties properly understand their role.

3. The role of staff in dispute resolution is clearly stated to:

   - Act as an impartial source of information about the issues in dispute including scientific and technical information.
   - Provide information about EUB policies, rules and practices.
   - Provide fair and impartial guidance to parties about the likely approach of EUB management and/or the Board to any particular issue.

4. EUB communication material clearly supports and outlines the availability and the role of its staff.

2.5.4 Coordinator of ADR Services

Recommendations:

1. The EUB create a "Coordinator of ADR Services" position which will be responsible for the ADR initiative including:

   - monitoring of the ADR program including reporting to the Board Advisory Committee and EUB,
   - recommending/implementing modifications to the program,

- monitoring ADR training initiatives for EUB staff and mediators,
- monitoring and overseeing the service provider,
- identifying opportunities for ADR to be used and contacting parties considering ADR to encourage their participation,
- arranging attendance of appropriate EUB staff at Preliminary ADR Meeting and mediation,
- coordinating communication with the media on ADR initiatives,
- liasing with other government departments and agencies to arrange technical input and representation where appropriate,
- ensuring proper follow-up occurs to settlements reached through the ADR processes,
- continuing research on innovative decision-making methodologies.

2.6 The Role of the Service Provider

Recommendations:

1. The EUB, through the Advisory Committee, include as part of its Roster process, a call for proposals from service providers for inclusion on a "Service Provider Roster".

   The criteria for inclusion should include:
   - Demonstrated experience and expertise in ADR system design, management and case building.
   - Working knowledge of the EUB regulatory system and its stakeholders.
   - Working knowledge of the various ADR professionals on roster or otherwise available for the EUB ADR System.
   - Professional references supporting the service provider's ability to manage the ADR systems set up.
   - An acceptable database, performance measurement and reporting system.

2. The EUB Coordinator of ADR Services role includes guiding the use of the service provider roster and the mediator roster to best deliver the ADR service to stakeholders and maintaining neutrality and the EUB's regulatory role.

2.6.2 Roster

Recommendations:

1. The EUB establish a multi-stakeholder ADR Advisory Committee with members from various stakeholder areas. The Committee will be responsible for matters such as reviewing the qualifications of mediators and assuring a high level of competency among those chosen for the roster, determining the numbers of mediators on the roster and adding and removing mediators from the roster as necessary.

2.7 Enforcement

Recommendations:

1. EUB staff are made available to the parties to assist with identifying and addressing enforcement issues.

2. The parties are encouraged to identify and address these concerns in their Preliminary ADR Meeting and subsequent mediation(s).

3. The parties be advised to address these issues in their final agreement.

2.8 Jurisdiction

Recommendations:

1. The EUB Board and management initiate discussions with related agencies such as the Surface Rights Board and Alberta Environment to work towards greater cooperation.

2. Particularly with these two Board's, there should be a sharing of the objectives of the EUB ADR System and an attempt to negotiate protocols with those bodies to facilitate the attendance of relevant staff at ADR meetings to support the creation of a more complete agreement.

3. The EUB should invite representation from these Boards on its ongoing ADR Advisory Committee.

2.9 Confidentiality, Privacy and Without Prejudice

Recommendations:

1. Matters of confidentiality, disclosure, privacy and media contacts be addressed and determined by the parties.

2. The EUB Law Department prepares a statement outlining the effect of the Freedom of Information and Protection of Privacy Act on ADR meetings for distribution to participants.

3. In an EUB hearing, the Board panel respect confidentiality agreements, established by participants who have attempted to resolve the matter through the ADR program, to the greatest extent possible.

3.0 Communication Plan

3.1 EUB Staff Communication

Recommendations:

1. A comprehensive communication plan should be developed for delivering the message of the EUB ADR System to staff. The plan should address the content of these changes and their management. The plan should include short term and long term communication needs.

2. A communication consultant should be contracted to develop a comprehensive plan for communicating the ADR System to external stakeholders.

3. The EUB should encourage stakeholders to acquire a sound understanding of mediation and training in interest-based dispute resolution.

3.2 Brochure

Recommendations:

1. Stakeholders appear to value the role the EUB plays in promoting the use of interest-based processes to resolve application and operational issues within the industry. For that reason, and to ensure a consistent message is delivered to users, it is recommended the EUB undertake publication and distribution of this brochure.

2. Some thought was given to whether a separate brochure should be developed for each affected group, i.e., one for land owners and one for industry. It is recommended, however, only one brochure be published to ensure consistency.

4.0 Training

Recommendations:

1. Communication skills for interest-based conflict resolution and an understanding of EUB relevant appropriate dispute resolution processes be a core competency for all EUB employees. This would assist in ensuring that the culture of conflict resolution within the EUB, particularly for management of external disputes, reflects interest-based processes and skills. The currently offered two day in-house training on conflict resolution serves as an outline for this training. It is suggested this training be accomplished by late fall 2001.

2. All EUB staff who in any way facilitate discussions between land owners, other public representatives and industry, or between industry representatives, participate in a three day facilitation and mediation training program, after they have completed the above-mentioned two day conflict resolution training. This training would build on the experience and related training already acquired by staff. The desired result is competency in interest-based facilitation skills and an understanding of the use of mediation for EUB.
   - A three day program is suggested as the best opportunity to integrate skills as fully as possible.
   - Training should be provided off-site to minimize distractions.
   - Training should be skill based and use case studies and simulations to provide experiential learning.
   - Attendance per session should be a maximum of 20
   - Attendance should reflect a mix of experience and geographical location of staff.

   See 4.1 Intermediate Training Program for more details.

3. Among staff facilitators there should be an identified group, selected for their inherent skills, experience and desire, who participate in additional in-depth training in advanced facilitation and mediation. This group, hopefully with wide geographical representation, would serve as in-house resource for:
   - Supporting other staff regarding challenging facilitations.
   - Conducting challenging facilitations.
   - Providing ongoing training updates and communication with staff related to facilitation.
   - Providing information for staff related to the EUB ADR System.
   - Providing information for public and industry related to the EUB mediation process.

   See 4.2 Advanced Training Program for more details.

4. Staff who facilitate problem solving should participate regularly in training updates.

5. External stakeholders be encouraged to acquire a sound understanding of the EUB ADR System and training in interest-based dispute resolution.

5.0 Database and Performance Measures

1. The EUB and the Standing Committee create quantitative reports and qualitative surveys for the EUB ADR System.

2. The EUB utilize a simple spread sheet program in the early stages of its pilot project.

3. The data collected should ideally enable users of the system to do a cost benefit analysis wherever possible.

Appendices

Appendix 1

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Appendix 2
Experience from other Jurisdictions

Through the research undertaken for this report a large number of agencies were identified in Canada and the U.S. which have incorporated or are exploring the incorporation of ADR processes into their operations. The following is a list of some of the many regulatory agencies pursuing ADR initiatives:

National Energy Board
BC Oil & Gas Commission
Ontario Energy Board
Ontario Municipal Board
Alberta Environmental Appeal Board (Alberta Department of the Environment)
Alberta Municipal Affairs
Alberta Municipal Government Board
Alberta Natural Resources Conservation Board
California Energy Commission
Canadian Environmental Assessment Agency
U.S. Department of Agriculture
U.S. Environmental Protection Agency
U.S. Federal Energy Regulatory Commission

The approaches these agencies have taken to ADR vary substantially however it is clear that all are trying to find alternative collaborative approaches to meeting their legislated decision-making mandate.

Different agencies have different approaches to whether the mediation would be voluntary or mandatory and some agency procedures are written in a form that mediation may be initiated by either party or the particular agency. Funding arrangements vary based on the enabling legislation and some agencies (for example, the Oil and Gas Commission and the Environmental Assessment Agency have the requirement that ADR be considered or pursued included their legislation).

Some agencies such as the National Energy Board will allow staff or even Board members to undertake the mediation. The National Energy Board is somewhat unique in establishing that reports from a mediation can only be admitted to subsequent Board hearings with the Board's agreement. The National Energy Board and the Environmental Appeal Board try to protect the confidentiality agreements reached by parties in a mediation.

The National Energy Board guidelines state that "mediation ... may serve to streamline and minimize regulatory proceedings involving pipeline companies and land owners".

A number of agencies as a first step in creating a more flexible adjudicatory system encourage or require pre-hearing meetings with the members of the panel. The Ontario Energy Board

model is interesting in that they may hold up to three types of pre-hearing conferences: technical, issues and settlement whose purposes are self-explanatory. Although this pre-hearing approach is still quite formal and doesn't allow in-depth discussion between the parties, it is a valuable step forward in modifying the existing systems.

Due to differences in the mandates and jurisdiction, enabling legislation, practical considerations and political openness to change, it is not possible to effectively compare different agencies in their ADR approaches. The important conclusion rather is that almost all agencies involved in natural resource regulation which were surveyed are trying to add flexibility to their processes through ADR approaches.

Appendix 3
Scientific and Technical Issues in Mediation

Commentary:

In today's environment, the public is highly sensitized to potential health risks associated with exploration and production activities. The question of the relevance, credibility and implications of scientific information lies at the heart of many local and province-wide disputes.

The incorporation and evaluation of scientific evidence into both the current hearing process and the proposed ADR process is a major challenge to the EUB. There has been criticism of the current process in which disputing experts are cross-examined at length before EUB panels that are empowered to make decisions. The fact that the experts themselves are unable to reach consensus on these matters indicates the difficulty facing the EUB panels.

In many disputes throughout the world, the 'battle of experts' is a result of the confrontational win-lose approach to resolving disputes. In situations where collaborative approaches to science have been used, the parties look for points on which to agree rather than points on which to disagree. Quickly, the parties identify the areas of agreement and then move to the areas under contention and try to find ways to resolve them to the satisfaction of all. Although the basic facts of the matter are identical in the confrontational and the collaborative approaches, the collaborative process sees the scientific data as information while the traditional approach sees it as another forum for disagreement.

Effective Mediation strategies within the EUB ADR System

1. In the Preliminary ADR Meeting, it will become clear whether there is a need to seek scientific evidence beyond that already available. It will be important for EUB staff to be involved in such discussions as they will be aware of the science which has been presented to Board members in other hearings and its credibility. All parties will have to be rigorous in their evaluation of the need for scientific evidence as a missed opportunity at this stage to seek necessary information could result in a later request for a hearing.

2. If it is deemed necessary to have scientific evidence available for the ADR process, collaborative methods to obtain such information should be established. In addition, the Preliminary ADR Meeting should determine how information collected for a mediation could be used if the matter were to go to a hearing. The industry has indicated its unwillingness to fund the collection of essentially the same information for both an ADR process and again for a hearing.

3. In dealing with science through a collaborative process, the parties should:

   - first determine the matters on which there is agreement, possibly at the Preliminary ADR Meeting;
   - identify the matters on which there is no agreement and the matters for which sufficient information is not available to make a determination;
   - determine if and how the dispute could be resolved without researching these questions for which scientific data is not currently available;
   - determine the best methods to obtain the necessary information.

4. There are a number of approaches that other industries have used for addressing scientific matters in a collaborative manner. These include techniques such as:

   - parties jointly determine which experts to retain and the questions to be addressed;
   - parties request the regulatory agency to establish a scientific panel of recognized experts which can be questioned;
   - the agency requests the assistance of the professional organization representing the relevant scientific field to establish the best way of resolving the outstanding matters. This could include hiring a firm to analyze the information, protect confidentiality and undertake additional research.

Recommendations:

1. The EUB encourage parties in dispute to use innovative approaches to dealing with matters of science.

2. The EUB explore methods of addressing science in hearings used by other jurisdictions such as limiting the number of witnesses, creating a neutral panel of experts and having questions for the expert witnesses submitted for written answers before the hearing.

Appendix 4a
Participant's Agreement to Mediate

Environmental Appeal Board

In the matter of the mediation of the appeal of the decision of (NAME), (TITLE): Alberta Environmental Protection, to issue (TYPE. I.E., LAND RECLAMATION, APPROVAL, AND NUMBER).

Between:

(NAME OF APPELLANT)	)
and	)
(NAME), (TITLE) Alberta Environmental Protection	) the "Parties"
and	)
(NAME OF COMPANY)	)

The Parties agree as follows:

1. The purpose of this agreement is to indicate the intention of the undersigned to participate in mediation in an effort to resolve this appeal.

2. The Parties have been advised and encouraged to seek independent legal advice, to ensure that they are fully informed of their legal rights and obligations.

3. The mediator has been appointed by the Environmental Appeal Board to assist the Parties in reaching a mutually agreeable resolution of the appeal, based on full and frank disclosure between them.

4. All communications made to or through the mediator shall be confidential and without prejudice to the position of a party in any further proceedings. This means that communications during this mediation cannot be raised in subsequent hearings or court proceedings.

5. The mediator is not compellable as a witness and will not be called as a witness by any of the parties in any subsequent hearings or court proceedings.

6. The mediator will not take part in any subsequent deliberations, discussions or hearings of the Environmental Appeal Board pertaining to the matters of this appeal.

7. If a resolution of the appeal is reached, a Report and Recommendations reflecting the agreed upon resolution and signed by the Parties, will be submitted by the Board to the Minister of Environmental Protection for approval.

8. The Parties will abide by the terms of this agreement and at all times negotiate in good faith.

Dated at Edmonton, Alberta on (DATE).

_____

(NAME OF APPELLANT)

_____

Director, Alberta Environmental Protection

_____

(NAME OF COMPANY)

Appendix 4b.

TERMS and CONDITIONS IN THE MEDIATION OF THE DISPUTE OF
{Style of Cause} **(Our file: {File Numb**

CDRC means Canadian Dispute Resolution Corporation.

Dispute means the dispute between the Parties (collectively called the "Parties").

Mediation includes the mediation conference and the mediation proceedings.

Party means any one of the above captioned parties and includes a Party acting through counsel.

1. The Parties and the mediator(s) each confirm that they shall:
   a. conduct themselves in a bona fide and forthright manner; and
   b. make a serious attempt to settle the dispute.

2. Each Party represents that the Party has unrestricted decision making authority to settle the dispute at the mediation c ɔnference and is willing to consider compromises, accommodations and alternate solutions in a bona fide effort to settle the dispute.

3. Each Party acknowledges and agrees that:
   a. A mediator is an independent contractor and not a CDRC agent or employee.
   b. A mediator will not act as legal counsel for any Party.
   c. A mediator may disclose any information provided by any Party to any other Party unless the Party disclosing the information requests that the information be kept confidential.
   d. A Party or a mediator may terminate the mediation at any time.
   e. No Party shall subpoena or require a mediator to testify or produce records or notes in any judicial, arbitral, or other proceeding (collectively called "Proceedings"), or for any reason whatsoever.
   f. No Party shall rely on or introduce in evidence in subsequent Proceedings:
      (i) another Party's views, suggestions or willingness to accept a settlement proposal; or
      (ii) any admissions made by any other Party in the course of the mediation.

DATED at the City of Calgary, in the Province of Alberta, on {Event Date}.

{Mediator}{First Name} {Mediator}{Surname}, Mediator

{Plaintiff Counsel}{Representing}, the Plaintiff

{Defence Counsel}{First Name} {Defence Counsel}{Surname}, Defence Counsel

{Plaintiff Counsel}{First Name} {Plaintiff Counsel}{Surname}, Plaintiff Counsel

{Adjuster}{First Name} {Adjuster}{Surname}, Insurer

Appendix 4c.

TERMS and CONDITIONS IN THE PRELIMINARY ADR MEETING OF THE DISPUTE OF {Style of Cause} (Our file: {File Numb

Dispute means the dispute between the Parties (collectively called the "Parties").

Preliminary ADR Meeting may include a mediation conference with a mediator.

Party means any one of the above captioned parties and includes a Party acting through counsel.

1. The Parties and the mediator(s) each confirm that they shall:
   a. conduct themselves in a bona fide and forthright manner; and
   b. make a serious attempt to settle the dispute.

2. Each Party represents that the Party has unrestricted decision making authority to settle the dispute at the mediation conference and is willing to consider compromises, accommodations and alternate solutions in a bona fide effort to settle the dispute.

3. Each Party acknowledges and agrees that:
   a. A mediator will not act as legal counsel for any Party.
   b. A mediator may disclose any information provided by any Party to any other Party unless the Party disclosing the information requests that the information be kept confidential.
   c. A Party or a mediator may terminate the mediation at any time.
   d. No Party shall subpoena or require a mediator to testify or produce records or notes in any judicial, arbitral, or other proceeding (collectively called "Proceedings"), or for any reason whatsoever.
   e. No Party shall rely on or introduce in evidence in subsequent Proceedings:
      (i) another Party's views, suggestions or willingness to accept a settlement proposal; or
      (ii) any admissions made by any other Party in the course of the mediation.

DATED at the City of Calgary, in the Province of Alberta, on {Event Date}.

_____
Party:

_____
Party:

_____
Mediator:

_____
Counsel:

_____
Counsel:

Appendix 5

NEGOTIATION

Definition

Negotiation is any form of direct or indirect "unfacilitated" communication in which opposing parties discuss steps they could take to resolve a dispute between them. It can occur directly by principals or indirectly through agents such as lawyers.

Process

There is no set process for negotiations but, typically, negotiating parties make a serous attempt to resolve the disagreement by:

- clearly articulating the issue to be resolved;
- identifying underlying interests;
- isolating points of agreement and disagreement;
- exploring alternative solutions;
- considering compromises or accommodations;
- taking any other measure that will assist to resolve the dispute.

Parties may conduct negotiations through the exchange of written material or face to face meeting.

Certain conditions will enhance the likelihood of successful negotiation. These include:

- initiating negotiation at the earliest possible date;
- identify and involve all proper parties to the negotiation;
- early and frank disclosure of all information relevant to the issue being negotiated;
- participation in the negotiation by representatives with authority to settle, or alternatively with immediate access to persons with authority to settle; and
- where a party attends a negotiation with a limitation on his or her authority to settle, that limitation should be announced at the commencement of the meeting.

As with all attempts to settle disagreement, negotiation is typically most productive when there is an agreement that all written or unwritten information disclosed in the discussions will be kept confidential.

Negotiation is a voluntary process. That is, parties enter into it voluntarily and may terminate or leave the process at any time.

Any agreement arising out of a negotiation should be confirmed in writing and signed by representatives for the participating parties.

MEDIATION

Definition

Mediation is a non-binding process where a neutral, impartial third party, with no decision-making authority, attempts to facilitate a settlement between disputing parties.

"Interest-based mediation" involves framing the dispute between the parties in terms of underlying needs, concerns or interests, and helping the parties to formulate resolutions in terms of options which satisfy as many of the underlying needs or interests as possible.

Mediation often consists of the following stages:

- The parties agree on a mediator.
- The mediator makes a short opening statement explaining the process, establishing the ground rules for conduct, reviewing the agreement to mediate, and describing his or her own role.
- The mediator asks each party to explain the facts of the dispute from their perspective and describe what they think needs to be resolved.
- The mediator works with the parties to identify clearly and concisely the issues that are in dispute. The mediator helps develop goals for the mediation which incorporate the needs and interests of the parties.
- The parties discuss the issues one at a time and identify options for resolving them. The mediator helps to assess and analyze the options, but the mediator does not take sides.

- At some point during the mediation, the mediator may want to meet separately with the parties for a private "caucus". Breaks can be taken at any time parties want to talk to their lawyer or someone else.

- If settlement is reached on some or all of the issues, you will probably formalize the settlement through a settlement agreement signed by all the parties, or by a consent order. Any settlement agreement must be completely voluntary.

SETTLEMENT CONFERENCE

Definition

Settlement conference is a term used to describe an informal but structured (often multi-party) negotiation directly between the parties. The primary objectives of a settlement conference are to resolve all or some of the issues, and, possibly, to refer unresolved issues to another ADR process. Other objectives of the conference can include:

- Expediting the disposition of cases;
- Discouraging wasteful pre-decision activities;
- Improved efficiency of the hearing process through more thorough preparation; and
- Negotiating the settlement of the case.

The parties may elect in some settlement conferences, or at some time in any settlement conference, to involve a facilitator to assist the parties in reaching an agreement.

NEUTRAL EVALUATION

Definition

Neutral evaluation is a process where parties obtain from an experienced (and possibly expert) neutral, a non-binding, reasoned evaluation of their dispute on its merits. The opinion or assessment is expected to have persuasive value, especially to the extent that the neutral is jointly selected.

Process

- A neutral evaluation can occur any time the parties have agreed to it.
- A neutral evaluation is conducted by one person jointly appointed by the parties.
- The neutral evaluator must be independent and impartial. In other words, the neutral evaluator must have no interest in the outcome of the case, must not be biased, and must be independent of every party.
- Generally, the parties communicate with the neutral evaluator in the presence of all the other parties or in writing, with copies to the other parties.
- The parties should cooperate fully with the neutral evaluator and comply with any of his or her requests for information.
- The neutral evaluator may give directions concerning the timing of submissions.
- A neutral evaluation is conducted only on the basis of the documents submitted by the parties unless the parties agree to additional submissions or other forms of evidence.
- If the parties agree to make verbal submissions to the neutral evaluator, they must do so in the manner determined by the neutral evaluator.
- If any party elects not to participate in the neutral evaluation, the neutral evaluator may, if the remaining parties agree, provide an opinion based solely on the information and submissions made or give written notice of the termination of the neutral evaluation.

NON-BINDING ARBITRATION / MINI-TRIAL

Definition

Non-binding arbitration is a dispute resolution process in which a dispute is submitted through formal presentation of evidence and arguments to a neutral adjudicator, who is empowered by the disputants to recommend non-binding terms of settlement. This process differs from neutral evaluation in that it is more formal and definitionally includes a hearing. This process differs from binding arbitration in that the parties must agree before the arbitrator's decision is binding.

Process

- Before agreeing to initiate an arbitration all parties who would participate in the arbitration should consider:
  a. agreeing upon a statement of issues;
  b. establishing a statement of agreed facts;
  c. a statement of the outcome each party seeks; and
  d. a statement outlining any issues of relevance in selecting the arbitrator and the time and the place for the arbitration.

- The parties must agree on and appoint an arbitrator.

- The arbitrator and the parties should agree on the rules of arbitration before the arbitration begins. The rules should deal with all aspects of the arbitration including: any discovery proceedings; how the hearings are to be conducted; where the arbitration is to take place; how the expenses of the arbitrator are to be paid; and how the arbitrators decision (or award) is to be issued. The arbitrator has the authority to give directions on procedural matters including adjournments, exclusion of witnesses, disclosure of documents and admissibility of evidence.

- At the arbitration hearing, parties may present oral and documentary evidence. The procedure should be as simple as possible and the strict rules of evidence should not apply.

- Upon completion of the arbitration, the arbitrator will issue a non-binding decision or award.

- Unless otherwise provided by the parties, all information received by the arbitrators and disclosed by the parties during the arbitration is confidential.

BINDING ARBITRATION

Definition

Binding arbitration is a dispute resolution process in which a dispute is submitted through presentation of evidence and arguments to a neutral adjudicator, who is empowered by the disputants to impose a binding decision or award. This process will be rare in the EUB environment, but may help resolve issues that are beyond EUB jurisdiction but where the parties just need an answer (for example, compensation).

Process

- Before agreeing to initiate an arbitration all parties who would participate in the arbitration should consider:
  a. agreeing upon a statement of issues;
  b. establishing a statement of agreed facts;
  c. a statement of the outcome each party seeks; and
  d. a statement outlining any issues of relevance in selecting the arbitrator and the time and the place for the arbitration.

- The parties must agree on an arbitrator.

- The arbitrator and the parties should agree upon the rules of the arbitration before the arbitration begins. The rules should deal with all aspects of the arbitration including; any discovery procedures; how the hearings are to be conducted; where the arbitration is to take place; how the expenses of the arbitrator are to be paid; and how the arbitrators decision (or award) is to be issued. The arbitrator has the authority to give directions on procedural matters including adjournments, exclusion of witnesses, disclosure of documents and admissibility of evidence.

- At the arbitration hearing, parties may present oral and documentary evidence. The procedure tends to be relatively simple and the strict rules of evidence do not apply.

- Upon completion of the arbitration, the arbitrator will issue a decision or award.

- The parties are jointly responsible for all costs and expenses of the arbitration unless they agree otherwise.

- Unless otherwise provided by the parties, all information received by the arbitrators and disclosed by the parties during the arbitration is confidential.

Appendix 6

Appendix 6

23 March 1999

FROM:

TO:

FACILITIES DIVISION
EUB STAFF ROLE IN CONFLICT RESOLUTION
PRE-APPLICATION AND NON-ROUTINE APPLICATIONS

Purpose

The EUB is concerned that the profile of opposition to energy development in certain areas of the province is escalating to the point of causing general concern to many Albertans. The EUB is increasing its efforts to facilitate resolution of conflicts in the field and to ensure that parties affected by energy development are provided with factual and objective information about the impacts of energy development. Industry, through CAPP is also increasing its effort in this area.

The purpose of this paper is to describe the EUB's roles and responsibilities regarding public/industry and industry/industry conflict resolution around proposed new, and modifications to existing, facilities in the pre-application and non-routine application phases.

This paper also suggests possible short and long-term conflict resolution processes that could be implemented by the Facilities Applications and Field Surveillance Groups to address these concerns. This discussion is restricted to those facilities within the responsibility of the Facilities Division. It is intended to expand the processes to cover operational issues in the future as well.

Discussion/Background

First, it is important to understand that the majority of applications processed by the EUB for proposed facilities and modifications are approved without the need for EUB staff facilitation once all requirements have been satisfied. To put this into context, of the more than 20,000 applications processed last year only 33 hearings were required. This includes industry/industry issues as well as industry/public issues.

The current philosophy of the EUB is that it is the responsibility of the proponent of a new facility, or modification to existing facilities, to discuss the proposal with landowners and identify and address the concerns with limited EUB staff involvement prior to submitting an application. It is also expected that the public attempt to have its concerns addressed with the proponent with little or no EUB staff involvement. The industry must be held responsible and accountable for its facilities. This process

minimizes the time commitment required for EUB staff involvement, however some staff involvement currently occurs at both the field and head office staff levels. Lack of field and head office staff involvement at the initial contact stage has occasionally resulted in a feeling of frustration by both the public and the industry.

This differs from the Boards earlier philosophy that it work cooperatively with all involved parties early in the process to identify issues/concerns and to try to develop practical and sensible solutions outside of the public hearing process whenever possible. For many years EUB staff expended significant effort successfully facilitating/ mediating issues between the industry and other stakeholders, at times eliminating the need for public hearings, or at least focussing the issues to be addressed at a hearing. This does not necessarily mean that the EUB should return to the way it did business in the past, however, there is a need for a shift in that direction.

In the past, some companies misunderstood the requirements and expectations or abrogated their responsibility under the legislation through utilization of EUB staff to solve industry problems. EUB staff were often too involved in developing solutions rather than allowing the company and landowner to find mutually agreeable resolution. Therefore, any effort to return to additional facilitation and/or mediation should be tempered with the continued need to hold industry accountable to its public consultation and notification requirements.

Staff and our customers believe this change in philosophy has resulted in a reduction in confidence and trust in the EUB.

Need for an Effective EUB Conflict Resolution Process

The EUB's Vision states that:

> "We are an accessible, effective, and respected organization that knows its customers, **works with them jointly to solve problems**, recognizes their changing needs and **serves them in an efficient and timely manner.**"
>
> "We cooperate and maintain an **ongoing dialogue** with all our customers."

The Facilities Division mission states that:

> "The Facilities Division provides a regulatory process that **promotes industry understanding and compliance** with regulatory requirements for facilities."

Achieving this vision and mission would result in a public confident in the EUB, and an industry that understands, respects, meets or exceeds requirements and expectations. In order to achieve this with the current philosophy the Board will need consistent implementation of the processes and sufficient resources to achieve acceptable results.

Generally, the public trusts that the EUB will protect its interests, including health, safety and the environment, through appropriate regulation and due process. However, the

current pace of resource development, particularly deep sour gas, the changing industry (many more companies), and increased residential development (resulting in encroachment of oil and gas and other development on each other) has led to increasing public demand for involvement in decisions that will affect their lives. Growing public concern often results from misinformation and a lack of early access to factual information. Dissatisfaction with industry consultation efforts and lack of understanding of EUB requirements, expectations and process, inadequate conflict resolution processes (including the use of unskilled staff), and lack of access to suitable communication tools often results in stakeholder objections to proposed projects. Although the responsibility for developing and implementing stakeholder consultation programs belongs to industry, the EUB also has a responsibility. That responsibility is to strike a balance between accountability, enforcement and education. This can be achieved by ensuring that the requirement for consultation and the level of consultation expected is known to both industry and other stakeholders.

The EUB has a responsibility to ensure that its customers have access to the information needed to assist in understanding the decision making process, regulatory requirements and available options. EUB staff, particularly at the field level, should be made available to its customers to:

- discuss concerns regarding proposed developments,
- assist them in understanding what is required of industry,
- facilitate the discussion of possible solutions,
- assist in understanding what areas/issues are within the mandate of the EUB and which are not (eg. compensation), and
- ensure that they understand alternative EUB processes available to them if no suitable solution can be found.

The majority of our customers are satisfied with their dealings with industry and have no need for EUB involvement or intervention. However, we need to ensure that those who seek assistance or direction from the EUB have access to the information and resources they require.

Public trust and confidence is most often a function of long-term relationship building. Effectively communicating with our customers to resolve conflict and build a relationship requires commitment, accessibility, communication skills, and knowledge of the issues. Many of our customers are not aware of how to access these EUB resources when conflicts arise, at times resulting in a lack of trust and confidence in the EUB.

EUB staff recognize that concerns and conflicts can be addressed more effectively and lasting relationships can be established if:

- Conflict resolution steps are implemented as early as possible when conflicts arise,

- EUB requirements, processes and information needs are well defined and understood early in the process,

- Issues are identified, clarified and understood by the landowner and the company early in the process,

- Available alternative solutions and requirements are identified early on, and

- Parties can reach mutually agreed solutions.

The company must take the lead role and involve the landowner in defining the issues, and discussing possible solutions. EUB staff would be prepared to assist or facilitate when asked or when staff believe our assistance may be helpful in all of the above points with limited involvement in the last item. EUB staff could possibly suggest the use of third parties to assist in resolving conflict when it believes this may be beneficial.

Principles of Effective Conflict Resolution

The following are key principles of effective conflict resolution processes:

- All stakeholders must be provided the opportunity to participate in an open and fair decision making process,

- All stakeholders have the right to be informed of a company's proposed development plans,

- All stakeholders must be provided access to resources in order to be an equal participant in the decision making process when issues directly affect them,

- Stakeholder conflict resolution must begin early on in the process and must recognize concerns as legitimate,

- Conflict resolution takes place with each party recognizing that balanced decisions can be achieved in a non-adversarial environment through a process of mutual understanding, negotiation and compromise, and

- All stakeholders are committed to the process with a desire to reach an agreeable outcome.

Desired Outcomes of Early and Effective EUB Involvement In Conflict Resolution

The following are desired outcomes of an effective conflict resolution strategy:

- Informed customers who feel they are equal partners in the decision-making process and that their views will be given fair and equitable consideration,

- Consistent EUB field staff role and involvement in conflict resolution,

- Increased focus on facilitation and other forms of conflict resolution between public/industry, industry/industry when conflicts arise, possibly resulting in fewer adversarial hearings,
- Pro-active solutions to issues as opposed to reactive arbitration or adjudication,
- Better customer understanding of EUB requirements and processes,
- Focussing issues, that may still require a public hearing to resolve, through early and effective conflict resolution,
- Long-term positive relationships between involved parties reducing the likelihood of repeated similar conflicts, and
- Increased public and industry confidence in the regulatory process and resulting decisions.

When Conflict Resolution Processes May Be Beneficial

There are three distinct phases in the life of a project where EUB staff involvement in conflict resolution strategies may be beneficial in resolving issues. These are:

- Pre-application – a facility is proposed however no formal application has yet been submitted to the EUB,
- Non-routine application – an application has been submitted to the EUB through the non-routine applications process due to outstanding issues, and
- Operations – conflicts arise as a result of operation of a facility.

Although this discussion focuses on conflict resolution strategies at the pre-application and non-routine phases, most may also apply to conflicts arising from operations.

Effective conflict resolution should be efficient, inexpensive, fair, timely and satisfying to all parties involved. The process requires that all parties are willing to find a solution to the issues outside of the formal hearing process. This does not mean that the process will necessarily result in such an agreement, however this must be the goal going in. The process must also involve party representatives with the authority to make decisions.

Conflict resolution can encompass many different techniques outside of the formal hearing process. It is important to understand the difference between these techniques in order to define the role of EUB staff. For information and discussion purposes only, the attached **Appendix** includes descriptions of various conflict resolution processes found in the literature reviewed.

Role of EUB Staff

The role of EUB staff can best be described as **facilitation.** The term mediation defines the more traditional role of formulating agreements between parties as described in the literature reviewed. The EUB may determine that the use of a formal third party mediation process could be beneficial in certain circumstances, however, the role of EUB staff is only to suggest to parties that they pursue other mechanisms to resolve conflict, not to try to act as mediator.

EUB staff should be knowledgeable, helpful, impartial, and act with integrity when involved in a facilitation role. As the regulator we should ensure that all parties have access to clear, understandable information about requirements and processes, we assist all parties in understanding the information, we bring parties together to discuss concerns, but we **do not** dictate specific solutions to the problems.

EUB staff should be responsible for identifying when it may be beneficial to bring willing parties together to clearly identify the issues, explore facts, understand the Board's decision making process and requirements, and identify possible solutions. Staff must always keep in mind that the Board has an adjudicative role which must be fair, and seen to be fair, and therefore staff cannot get too involved in defining solutions or formulating agreements.

Staff must also be able to recognize when the parties are no longer willing to continue discussions or no mutually agreeable solutions can be found, and a more formal process such as mediation or a public hearing may be required to make a decision. Staff must also recognize when the issues are clearly outside of the EUB's jurisdiction (eg. compensation) and advise the parties of this early on in the process.

Pre-Application/Non-Routine Processes

EUB staff can be alerted to conflicts arising regarding proposed facilities prior to or following receipt of an application in a number of ways:

- The local Field Centre or the Facilities Applications Group may receive a telephone call from a concerned member of the public or from a representative of industry who has been alerted of public concerns regarding a proposed project,

- The local EUB Field Centre or the Facilities Applications Group may receive a letter from a concerned member of the public regarding a proposed project either for which an application has been received or prior to receipt of an application, or

- A member of the public may visit the local Field Centre to express concern regarding a proposed industry project.

Following is a summary of steps to be taken by staff when contacted including roles and responsibilities of EUB staff and expectations of the industry and the public.
A more complete description of a proposed process defining the role of Field Surveillance and Facilities Applications staff in Conflict Resolution relating to proposed facilities is attached.

Steps that should be taken when contacted by the public or industry regarding conflict include:

- Determining if an application has been received,
- Determining if parties have discussed the issues and if not encourage they do so if all parties are willing to have such discussion without EUB involvement
- Determine if the issues are within EUB jurisdiction and if so if all parties would be willing to meet with the EUB as facilitator to discuss concerns etc.

The role of EUB staff in facilitation includes:

- Determining whether parties are willing to explore solutions to issues/concerns,
- Bringing interested parties together in a location mutually agreed to by the parties involved,
- Assisting the parties in clearly understanding what is being proposed,
- Assisting the parties in understanding the EUB decision-making process,
- Assisting in identifying issues/concerns,
- Explaining relevant EUB requirements,
- Assisting in determining possible solutions to the concerns/issues without leading the parties to any particular solution,
- Advising the parties to explore alternate dispute resolution mechanisms when it does not appear that a suitable solution can be found through facilitation,
- Documenting commitments and expectations as discussed by parties, and
- Keeping other internal customers informed of facilitation efforts.

Long-Term Needs to Address Operational Conflict Resolution

A similar process needs to be developed to address conflicts arising from the operation of existing facilities.

23 March 1999

Draft for internal discussions - not for circulation

ATTACHMENT #1

GUIDELINES FOR EARLY EUB INVOLVEMENT
EUB FACILATION/MEDIATION PROCEDURES

The vast majority of applications to the EUB do not involve conflicts between companies and landowners. These procedures are for situations where concerns are raised and EUB staff is involved. The EUB must hold companies responsible and accountable for resolving conflict.

The Board, Industry and the Public have all indicated that EUB staff should be more involved in dealing with Oil and Gas company and Landowner concerns and disputes regarding proposed facility developments including wells, pipelines, batteries and plants.

The guidelines below suggest a sequence of events that may typically take place when a responsible oil and gas company is considering a new facility. The company representatives must be aware of regulatory expectations for notification of, and consultation with, potentially effected landowners (G- 56, IL 89-4 etc), the CAPP Guide for Effective Public Involvement and proper negotiation and mediation principles.

PRE-APPLICATION – Field surveillance assumes lead role

- The company makes first contact with the landowner and potentially effected public in the area. There must be open and complete discussions regarding the needs, impacts, regulatory requirements etc. of the development following established guidelines and information packages developed by the Landmans association, EUB, farmers advocate etc.

- Follow up discussions may be held between the company and the landowner/public in order for each partly to listen and understand each other's concerns and find an agreeable solution if possible.

1) Either the company representative or the landowner/public may request EUB staff involvement after 1 or 2 meetings. The request may be directed to the Applications Group or the local Field Center; in either case the staff from each group will discuss how best to respond. Normally the response will be by Field staff who will discuss issues and concerns with both parties, attend meetings and facilitate discussions.

2) EUB staff who participate in the discussions may determine that a mutually agreeable solution between the company and landowner is possible and may suggest a number of options such as discussions with others who have had similar experiences, 3rd party mediation, etc. However, staff cannot dictate specific solutions and this must be negotiated between the landowner and company. In addition, it could put the EUB in

a difficult position if it was ruling on an application that may be perceived to be developed in part by it's staff.

3) EUB staff should encourage continuing dialogue between the parties. However, if this is not possible (time constraints, parties not willing to participate, monetary concerns etc), the company may still decide to submit an application even with the outstanding concerns, then:

   a) Field staff should encourage the landowner/public to detail all outstanding concerns in writing to the company with a copy to the EUB Applications Group.

   b) If Field staff have concerns with how the company may proceed they should contact the Applications Group.

   c) The Field staff should instruct the company (in writing where appropriate) to apply non-routinely in accordance with Guide 56.

   d) The Field staff should then send a copy of the above letter and a memo documenting their facilitation efforts to the non-routine section of the Applications Group.

NON-ROUTINE APPLICATION – Applications group assumes lead role

1) Upon receipt of a non-routine application involving landowner concerns and there is no material on file, the applications group should contact the area office to determine if they had any involvement in the dealing with the concerns etc.

2) **The Applications Group will not process an application when insufficient or no consultation or mediation has taken place with the public. The application will be closed and returned to the applicant who may re-submit once the requirements have been met.**

3) Should resolution of the concerns not be possible then the applications staff will commence the EUB's adjudication process by ensuring the application is complete and preparing recommendations to the Board on how to proceed with of the application. The applications group should determine if further assistance from the field staff is required.

4) The applications staff may request the Field staff to assist in the application process or participate in the hearing process as appropriate.

Appendix 7
Preliminary Process Design and Mediation Screen Checklist

Field Staff – Quick Guide

1. Do I know what the issues are?

2. Have we got the right parties to negotiate? Do other Government or regulatory agencies need to be involved?

3. Are the parties still talking to each other?

4. Is there some willingness to try a Preliminary ADR Meeting?

5. Can the roadblocks raised by the parties be negotiated?

Remember: ***Assume success, and if the parties are at all willing, then try to work out solutions to challenges and resistance through a Preliminary ADR Meeting.***

Appendix 8
Preliminary Process Design and Mediation Screen Criteria

Assessing cases as candidates for external mediation or other collaborative process.

Criteria/Guidelines

1. The Nature of the Dispute

a. Can the issues in this dispute be identified?
   - List and clarify with the parties.

b. Are these issues amenable to some form of negotiated solution?
   OR
   - Are there legal issues requiring a precedent?
   - Are there issues about which one party requires a board decision?
   - Are there credibility issues that must be addressed under oath?
   - Are these roadblocks real or can they be negotiated in a Preliminary ADR Meeting?

c. Are there issues with complex information concerns such as science and technology?
   - Can the parties manage these?
   - Will the parties be willing to disclose their information?

2. The Nature of the Parties

a. Who are the affected parties in this case?
   - List and clarify with the parties.

b. Do they understand what dispute resolution and mediation is about?
   - Especially the Preliminary ADR Meeting.

c. Is there a willingness to try for a negotiated settlement?
   - Are the parties willing or able to have real settlement authority at the table?

d. Beyond this dispute, do the parties have an ongoing relationship?
   - Are there possible shared future interests?

- Will a negotiated solution enhance future opportunities?

e. What is the current relationship among the parties?
   - How is the general attitude to each other?
   - Is there tolerance or at least a manageable level of hostility?

3. The Status of the Negotiations

a. What has happened with the negotiations to date?
   - Clarify with the parties.
   - Given the resources and knowledge base of the parties, can negotiations take place on a fair and even basis?
   - How much real and informed risk assessment has occurred?

b. What is the role of advisors in these negotiations?
   - Are the advisors willing to try this process?

c. Has communication amongst the parties broken down or become problematic?

Key approaches:

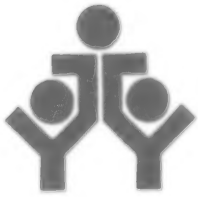
- Explain the Preliminary ADR Meeting to the parties.
- Let the parties address if they are willing to try it.
- Begin with the assumption that this case is suitable and assess for roadblocks or challenges.
- Approach all roadblocks and challenges with a view to seeing if they can be managed or solved perhaps in a Preliminary ADR Meeting.

Appendix 9

CODE OF ETHICAL CONDUCT

FOR MEDIATORS

A commentary with examples and guidelines



Published by

Alberta Arbitration and Mediation Society

CODE OF ETHICAL CONDUCT

FOR MEDIATORS

I INTEGRITY

A mediator must act with integrity.

II IMPARTIALITY

Mediators should be impartial in their conduct towards all parties.

COMPETENCE

A mediator has a duty to be competent.

IV CONFIDENTIALITY

A mediator must keep confidential matters disclosed in confidence, unless the law requires disclosure.

V DO NO HARM

Mediators should do no harm.

OTHER ETHICAL CODES OF CONDUCT

A mediator who is subject to another code of ethics is obliged to comply with that code, as well as this one, when acting as a mediator.

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CODE OF ETHICAL CONDUCT FOR MEDIATORS

Purpose of the Code

The Code of Ethical Conduct for Mediators adopted by the Board of Directors of the Alberta Arbitration and Mediation Society (AAMS) serves three principal purposes[1]

- to assure the public of fair, competent service from mediators,
- to guide and promote the ethical conduct of mediators, and
- to educate and inform those using the services of a mediator of the integrity, impartiality, competence, and conduct they can and should expect.

Organization of this document explained

This document is made up of three elements

an ethic, which denotes a manner of practice that is morally correct, principled, and honourable. The Code seeks to state, as an ethic, a fundamental element of mediation practice,

a commentary on the ethic, which describes the ethic in the context of a mediation process, and

guidelines, which prescribe in more detail norms of conduct expected of mediators.

As mediation practice grows, the commentary on the Code will grow and respond to emerging issues. Consequently, some of the explanations in the Code are brief and in some cases no examples or guidelines are yet prescribed.

[illegible] Code of Ethical Conduct must be distinguished from mediation rules. Mediation rules govern how the parties will deal with each other during a mediation; an ethical Code governs the conduct of the mediator in his or her practice.

[illegible] Arbitration and Mediation Society
September 1994

From time to time, an Ethics Committee will provide additional commentary, examples, and guidelines. Any new or revised ethical obligations will be established by the Board of Directors. The Ethics Committee is also charged with responsibility for responding to ethical questions posed to it.

Mediation defined

Mediation is a process by which parties in dispute seek to resolve their differences with the aid of an impartial third person. Entry into a mediation process need not be voluntary,[2] but any agreement or consensus reached must be voluntary.

Application of the Code

The Code has effect when it is adopted in one of the following ways:

(a) when parties to a mediation, and the mediator, agree that the mediator will act in accordance with the Code

[In this case, the Code becomes an agreement between the parties and the mediator and is enforceable in the same way any agreement is enforced.]

(b) when the AAMS, or another institution or agency, adopts the Code as applying to its mediator members, or adopts the Code as applying to mediators conducting mediations under its auspices[3]

[In this case, enforceability will depend on procedures established by the AAMS,[4] or the institution or agency adopting this Code. Enforcement mechanisms could range from terminating membership for serious breaches of the Code - to warnings. If the adopting agency is an alternative dispute resolution administrative agency, enforcement of the Code might result in loss of appointment privileges for the mediator.]

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2 For example, a court might direct parties to seek a mediated settlement of their dispute.

3 The Code was adopted by the Board of Directors of AAMS in Fall, 1994.

4 A draft set of rules is presently being prepared.

(c) when a mediator voluntarily subscribes to conducting mediations in accordance with the Code.

[In this case, there will be no legal enforcement mechanism unless the commitment is incorporated in a mediation agreement. But voluntarily adopting the Code would create a moral constraint and expectations about how the mediator will conduct himself or herself. These constraints and expectations could be the measure by which a mediator's conduct will be judged if questions about the legal liability of a mediator arise.]

Flexibility of the Code

Mediation, in the form in which it is now emerging, is an exciting, innovative, and fast developing field. Because of the wide application of mediation, it is recognized that in any ***particular*** mediation process the commentary or guidelines contained in this document may be inappropriate or need modification. In such a case, the mediator should draw the matter to the attention of the parties to the mediation and deal with the exception with the parties' fully informed consent.

Code Of Ethics

Applicable to all Members of the Institute in their capacity as arbitrators and mediators undertaking an arbitration or mediation assignment.

1 A Member should uphold the integrity and fairness of the arbitration and mediation process.

2. A Member should ensure that the parties involved in the arbitration or mediation are fairly informed and have an adequate understanding of the procedural aspects of the process, their rights relative to the providing of evidence and their obligations for payment of services rendered.

3. A Member shall satisfy him/herself that he/she is qualified to undertake and complete an appointment.

4. A Member should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias.

5. A Member in communicating with the parties should avoid impropriety or the appearance of impropriety.

6. A Member should conduct the proceedings fairly and diligently, exhibiting independence and impartiality.

7. A Member should be faithful to the relationship of trust and confidentiality inherent in the office of arbitrator or mediator.

8. A Member should conduct all proceedings related to the resolution of a dispute in accordance with the applicable law.

Appendix 10
Brochure

Land owner/Energy Company Disputes

Resolving Issues Through Mediation

About This Guide

The Alberta Energy and Utilities Board (EUB) has a regulatory role regarding oil and gas matters in this province and it also has a role in resolving issues and disputes among industry players and affected parties. The purpose of this guide is to explain how mediation can be used as a resolution process.

OPTIONS FOR RESOLVING ISSUES

Issues and disputes between land owners and energy companies can be resolved in a number of ways. Some methods are informal and flexible, others are more formal. The options can be viewed as existing along a continuum. At one end of the continuum are means for resolution, which allow parties control over the process used and the final arrangement. At the other end is an established formal procedure, which results in a decision made for the parties.

The options include:

Informal discussion and problem solving.
Parties are able to discuss and resolve the issue between them.

Direct negotiation.
Formal and facilitated negotiations directly between the affected parties.

Facilitation.
EUB staff may facilitate the communication and decision-making between the parties.

Mediation.
A professional neutral third party assists the parties in reaching a satisfactory agreement.

Board Hearing.
A formal adjudication process in which evidence is presented before EUB board members who render a binding decision.

Mediation is defined as a collaborative dispute resolution process in which the negotiations of two or more parties are assisted by neutral and impartial mediator. It is the mediator's job to help the parties reached a settlement of the issues that they find acceptable.

Benefits of Mediation
Many people find mediation beneficial because:

- They are involved in reaching their own solutions and avoid unpredictable third party decisions. People then tend to find more satisfaction with the outcome.
- The mediator assists in ensuring relevant issues are negotiated and that agreements are as complete as possible.
- It is faster and less costly than a Board Hearing or some negotiations.
- Constructive communication is a cornerstone of mediation and enhances the opportunity for positive future working relationships.

Generally, the process of mediation follows a certain series of steps. These are:

1. **Convening the Parties in Defining the Process**
   Initially the parties with the assistance of the mediator determine the guidelines they will follow, the decision-making authority of the parties, the need for confidentiality, timeframe for the mediation.

2. **Identifying the Issues**
   Clarification of the issues needing to be resolved.

3. **Understanding Information and Interests**
   An exchange between the parties of the necessary information for understanding the issues. A discussion of each party's specific thoughts and concerns regarding the identified issues.

4. **Creating Solutions and Agreement**
   With assistance from the mediator, the parties identify possible options, develop criteria for evaluating options and create an action plan or agreement.

The mediator's job is to assist the parties in their negotiations by ensuring complete, balanced and respectful communication and by moving the parties through the mediation process toward reaching a fully informed, voluntary agreement.

(Include a case study of an EUB mediation with reference to some of the following)

Special EUB Considerations

Some special considerations for mediation within the EUB process are the following:

When do we use mediation?

Before an application is made to the EUB, there are usually issues between the applicant and the affected parties. When these issues are complex, or when communication has broken down and the negotiation is not progressing, mediation becomes an appropriate alternative to consider.

Another situation suitable for mediation is after an application has been submitted to the EUB and there are outstanding objections.

Mediation might also be preferred when there are operational complaints that need to be resolved.

Initiating Mediation

- Parties may choose on their own to proceed with mediation; one party may invite the other to participate.
- EUB field staff may refer parties to mediation.
- The Board may encourage parties to use mediation before making an application or before continuing with the hearing process.

(Role of EUB Dispute Resolution Coordinator or the outside service provider can be inserted here when decisions on these roles are finalized - to contact parties, convene initial meetings, assist in choice of mediator, etc.)

Involvement of EUB Staff

Because of the often highly technical nature of the issues being negotiated and because of the fact that some of the results for these issues must meet allowable EUB compliance standards, the presence of an EUB staff member at the mediation will often be necessary. The staff member is a valuable source of information, particularly as agreements are being developed which must meet EUB requirements.

Process Design and Issues Identification

Again, because of the technical and possibly complex issues involved and because parties may want an opportunity to assess if mediation is the best process for resolution, the first step in the mediation process is a meeting to plan the process and identify issues.

The purpose of this initial meeting is to bring together all necessary parties to discuss the nature and extent of their dispute and to plan a mediation or other process for resolution. At this meeting the parties are assisted by the mediator to determine answers to the following matters:

The necessary participants for complete resolution
The level of decision-making authority required to be present
Clarification of issues requiring resolution
Required information in the process for obtaining it
The role of EUB staff or other experts
Identification of facts relevant to the situation
Willingness to continue to participate in mediation

In addition, the parties can address other logistical questions:

How privacy, confidentiality and disclosure of information will be handled
The timing and location of successive mediation meetings
The specific guidelines parties require for further productive mediation meetings
The final form that agreements should take
How agreements reached in the mediation process will be enforced

This meeting achieves the objective of steps one and two of a typical mediation. If the parties decide to continue with mediation, their successive meetings will address the objectives of steps three and four.

Expert Information for Mediations

In the EUB hearing process, parties provide the expert information they believe is necessary for their case. This information is subject to cross-examination by the other side.

Information is handled differently in a mediation process. Typically the parties jointly determine the information they require and jointly decide on who will provide the information and how it will be provided. For example, if parties need to reach an agreement on the value of a piece of property, instead of both of them hiring an appraiser they agree on a single appraiser they will use to supply the information they need.

Funding for Mediation Costs

For EUB mediations, costs will follow similar guidelines as for intervenor funding for the hearing process. Intervenor funding is intended to ensure all parties can participate on a fair and equal basis. The same principle applies for the mediation process

Frequently Asked Questions

What is mediation?
Mediation is a collaborative dispute resolution process in which the negotiations of two or more parties are assisted by a neutral and impartial mediator. It is the mediator's job to help the parties reach a settlement of the issues that they find acceptable.

Who can attend at the mediation with me?
The parties decide at the initial meeting who can and should be present. Advisors commonly attend mediation. Their role is usually limited to providing advice to the party they attend with and they do not participate as spokesperson.

If mediation is used, do I give up my right to the hearing process?
No. Mediation does not remove any right to participate at a hearing if the matters are not fully resolved during mediation.

When is mediation most effective?
As soon as possible when parties realize that issues are unresolved.

How is a mediator selected for mediation?
A list of suggested mediators will be provided so the parties have a choice.

How are the costs of the mediation covered?
Costs will follow similar guidelines as for intervenor funding for the hearing process.

Will a mediator impose a solution if we are unable to reach a final agreement?
No, a mediator is not a decision-maker for the parties. The mediator's role is to guide the process and keep the parties communicating.

What if we reach a partial settlement and some issues aren't resolved?
If the unresolved matters fall under the jurisdiction of the EUB, a board hearing can be used to obtain a final answer. Or the parties can turn to other organizations that may have jurisdiction such as the Alberta Surface

Rights Board.

Is the agreement we reach legally binding?
Agreements that affect EUB jurisdiction must meet EUB requirements. Parties can decide if it is necessary to write their agreement as a legal contract so that usual enforcement remedies are available if necessary.

How will the timing for the hearing process be affected if we participate in mediation and are unable to reach an agreement?
Participation in mediation should not affect the timing to hearing for application unless the parties agree to a different time schedule.

Appendix 11
Summary of Responses to Training Needs Questionnaire

A training needs questionnaire was distributed to group managers for further distribution to appropriate people in their groups. Fifteen replies were received; the responses are summarized below.

1. Please briefly describe the type of facilitation work you are involved with.

Staff are involved in facilitations involving objections to applications (6) and public complaints (4) to existing operations. They also facilitate industry to industry matters (2) and in major energy projects such as tar sands (2). Their role is to convene the parties and encourage resolution. They represent the EUB on regulation and policy matters and provide technical information to the parties.

2 The tasks for EUB facilitation were identified as:

Determining whether parties are willing to explore negotiation to reach agreement.
Convening interested parties in a mutually agreed location.
Assisting in identifying issues and concerns.
Assisting parties in understanding EUB decision-making process.
Explaining relevant EUB requirements.
Assisting in determining possible solutions without leading parties to a particular solution.
Advising parties to explore other dispute resolution processes when agreement does not appear possible through facilitation.
Documenting commitments as discussed by parties.
Keeping other internal customers informed of facilitation efforts.

Staff responses emphasize necessary facilitation skills primarily as good listening (empathy), communication skills (people skills), knowledge of the issues and an understanding and ability to explain EUB regulations and policy processes.

Other skills identified by staff as being necessary are:

Understanding of dispute resolution process.
An openness to new ideas.
An attitude/positive frame of mind.
Remaining impartial for all parties.
Building trust between parties.
Managing high emotional levels.
Assertive speaking skills.

An appreciation for range of possible/reasonable outcomes.
Asking questions to identify issues.

"We need an equipped toolbox as not every facilitation is exactly the same as another." Quote from staff.

3. **What facilitation skills would you like to have the opportunity to improve?**

Respondents indicated they would like the opportunity to enhance all their facilitation skills as well as increase understanding of dispute resolution processes. Other skills identified for further training are listening and analytical skills, the ability to draw out other points of view, handling tough questions, improving listening skills and how to remain impartial. The opportunity to learn through role-playing and from the experience of others was mentioned.

4. **Staff were requested to indicate the benefit to them of training in the following areas.**

Mediation practices and principles.
Understanding of dispute resolution processes.
Facilitation skills for creating effective discussion among parties.
Managing intense emotions.
Coaching parties for effective negotiation.
Facilitation of large groups.
Facilitation in small groups situations.

Responses to this query show that the first five areas were of most interest. These are: mediation practices and principles, an understanding of dispute resolution, facilitation skills for effective discussion, managing intense emotions and coaching for effective negotiation.

Of least interest was facilitation of large groups.

5. **Staff were asked to reflect on the level of mediation awareness that would be beneficial to them.**

Almost all respondents felt the basic understanding of mediation principles and process would be helpful. Some respondents indicated that this training is essential for effective facilitation and that a high level of understanding is needed.

Several times the idea was proposed that all staff be educated in general concepts in use of mediation. Staff more involved in facilitations would participate in an intermediate level of training. A core group could take advantage of more in depth mediation training.

6 Other areas of useful related training were identified as:

Risk communications, technical information to be armed for tough questions, handling diversity, dealing with difficult people, principles of negotiating.

7. Other comments.

"In the field, we are facilitators rather than mediators. As the regulator, we are one of the stakeholders rather than a neutral third party; therefore, we facilitate the process to meet our requirements."

"Need clarity on role EUB staff will play in mediation process."

"Anyone involved in mediation or facilitation should have some or all of the training listed in question 4."

"An ounce of mediation is better than a pound of hearing with an imposed solution."